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A CONCISE HISTORY

OF THE

COMMON LAW

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Let us now peruse our ancient books, for out of the old fields must come the new corn . . . 4 Inst. 109.

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THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY
ROCHESTER, N. Y.
1929

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THEODORE F. T. PLUCKNETT

PREFACE

History is so wide a subject and the points of view from which it may be surveyed are so various that a few words of explanation concerning the purpose of the following pages may perhaps be excused. They have been prepared as an historical introduction to the study of law, and stress has therefore been placed upon those historical conditions in politics, economics, and social and religious thought which have contributed to its formation. As the readers for whom it is designed are not professional historians, and are still in the early stages of their legal education, it was obviously the author's duty to avoid unnecessary detail and technicality. There are certain broad features of legal history which can be very well understood by the law student, and even by the general reader who is interested in such matters, and it is upon these that the most emphasis has been placed.

A book may very well be elementary without being inaccurate or obsolete, and so no effort has been spared to embody in the following chapters the results of the most recent research, although for obvious reasons it has not always been deemed necessary to make full citations to the sources and treatises employed. There is, however, an intimate connection between this volume and Dean Pound's *Readings on the History and System of the Common Law,* in the third edition of which the present writer collaborated. That volume contains a good deal of historical matter, and it seemed useful to make frequent reference to it. The historical portion of the *Readings* may therefore be regarded as a source-book for use in connection with the present work, or conversely, the reader may find here comments and explanations which will be useful in studying the historical portions of the *Readings.*

Everyone who is interested in the history of the common law is under an immense debt to the writings of Pollock and Maitland and of Holdsworth. Were it not for the nine masterly volumes of the Vinerian Professor neither this nor any other short history of English law could be written with any degree of confidence.

The gratitude and admiration which all lawyers and historians must feel in approaching that immense work cannot be expressed better than by using it constantly and studying it carefully.

Considerations of time, and especially of space, have compelled the omission of some matters which formed part of the original plan. More especially we regret the omission of a systematic treatment of the legal history of this country. Under the circumstances it has proved impossible. Upon this side of the Atlantic there has been no Reeves, no Maitland, no Pollock, and no Holdsworth. American Legal History is a field of enormous extent and extraordinary interest, but it still awaits its pioneers. It is easy to demand a knowledge of American Legal History, but except on one or two subjects that history is hardly known with enough certainty for treatment in a text book. It may be that in the future a small beginning may be made in making American Legal History available for the use of students; for the present, however, we must be content with presenting the historical basis of the legal system of this country in its broader aspects, in the hope that they will obtain in this study a sense of the position of the law in human life and history, of the forces which made for its development, of the difficulties which it had to overcome, and an idea of how an historian would place these things in the general scheme of progress.

T. F. T. P.

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A CONCISE HISTORY OF THE COMMON LAW

BOOK ONE
GENERAL PART

PART I
THE CROWN AND THE STATE

Legal history is a story which cannot be begun at the beginning. However remote the date at which we start, it will always be necessary to admit that much of the still remoter past that lies behind it will have to be considered as directly bearing upon the later history. Moreover, the further back we push our investigations, the scantier become our sources, and the more controversial and doubtful their interpretation. The comparatively short period of recorded history based upon documents soon leads us back to the immensely long ages of which we know nothing save through the methods of the archeologist. Into this enormous field of pre-history we shall not venture, although from time to time it will be necessary to refer to it when the problems of history raise immediate questions of pre-history.

For the purposes of this concise history we can begin with the advent of Christianity. Itself the culmination of several centuries of religious and ethical thinking in Judæa, it entered a world which was dominated by legal and political ideas which were in turn the result of centuries of political and juristic experience. Rome had reached the peak of its greatness. An Empire which spread over the entire civilized world, and which owed so much to the ideas of law and of government, seemed to be almost a revelation of the divine mission of the State. Government was the sacred destiny of the Roman people. To others might be left the vocations of art, of literature, of science; the Roman's part was to rule the nations, to impose the Roman peace and respect for law upon the barbarian, sparing the submissive

with statesmanlike tolerance, and crushing resistance with ruthless force. This immense Empire had been acquired through the energy of Roman armies, and preserved by the diligence of Roman administrators, but the time came when both services betrayed their master. Generals indulged in the game of making and deposing emperors; provincial governors exploited their subjects, established a hierarchy of functionaries such as China possessed, and as part of the system of taxation imposed upon the people a similar system of caste from which escape was almost impossible. In the meantime, a steady infiltration of barbarian blood changed the character, the culture, and finally the language of the ruling classes.[1] By slow and almost imperceptible degrees the ties that bound together the Roman Empire dissolved, and the mysterious and complicated fall of Rome became complete. "The two greatest problems in history, how to account for the rise of Rome, and how to account for her fall, never have been, perhaps never will be, thoroughly solved." [2]

While imperial Rome was slowly declining, Christianity was entering on a period of remarkable growth. At first it was hardly noticed among the numerous new cults which were fashionable importations from the Near-East, some of which were extremely popular. After being ignored, it was later persecuted, then under the great Constantine it was at last tolerated (324). So far, the established "Hellenistic" religion had been considered as an official department, and its priests as civil servants. Attempts had been made to incorporate with it the religions of Isis, Mithras, Christ, and others, on a similar footing, combining all the known gods in one vast polytheism, whose cult was to be maintained and controlled by the State. It was soon evident, however, that Christianity would not accept this inferior position. Although some things were Cæsar's, others were God's, and from this fundamental conflict arose the problem of Church and State, which has lasted from Constantine's day to our own. The controversy took a variety of forms in the course of the succeeding sixteen centuries. Stated in its broadest and most general terms,

[1] For an admirable short account, see Sir Paul Vinogradoff, in Chapter XIX of the *Cambridge Medieval History*, Vol. 1. (Reference to this authoritative work will be so frequent in the following pages that the abbreviation *C. Med. H.* will be used in citation.)

[2] J. S. Reid, in 1 *C. Med. H.* 24ff, 54.

it means that many earnest thinkers find it impossible to accept the State as the highest form of human society, and that they recognize some situations in which they would feel bound to obey some other duty than that imposed by the State. On the continent it lay at the root of the long conflict between the Empire and the papacy; in England it took such varied forms as the conflict with Thomas Becket, the discussion in Bracton as to the real position of the King (who is subject, he says, to God *and the law*), the Puritan revolution—and may even be traced in the American Constitutions, for the modern attempts to curb the power of the State by means of constitutional limitations are the result of the same distrust of the State as was expressed in former days in the conflict between religion and the secular power. It was also during the reign of Constantine that the great Council of Nicæa was held (325), attended by almost three hundred bishops from all parts of the world. Besides settling many fundamental matters of doctrine, this council was an imposing demonstration of the world-wide organization of the Church, and from this point onwards that organization grew increasingly effective, and the Church became more and more a world-power. As a result, the Empire had to admit the presence first of a potent ally, and soon of a vigorous rival. "The Nicene canons are the earliest code that can be called canon law of the whole Church, and at least in the West they enjoyed something like the same finality in the realm of discipline that the Nicene Creed enjoyed in the realm of doctrine." [1] Indeed, while the organization of the Empire was slowly breaking down, that of the Church was steadily growing, with the result that the Church soon offered a career comparable to, if not better than, that afforded by the State to men of ability who felt called to public life.[2] Some specialized in the study of theology; others took up the work of creating the great body of canon law which for a long time was to perpetuate the old Roman ideal of universal law. With all this, the growth of the power of the episcopate, and particularly of the papacy, was to give a new aspect to the ancient city of Rome, and slowly, but certainly, the Empire ruled from Rome was being replaced for practical purposes by Christendom ruled by the papacy.

1 C. H. Turner in 1 *C. Med. H.* 179.

2 1 Pollock and Maitland, *History of English Law* 4. (Henceforward this work will be cited as *P. & M.*)

CHAPTER I

THE ANGLO-SAXON PERIOD: RACES AND RELIGION

While this was happening at the heart of the Empire, many of the outskirts were witnessing a process such as went on in Britain. The conquest of Gaul inevitably drew the attention of Roman generals to Britain, whose population had intimate ties of race, language and sympathy with the Gauls. At times the Britons seem to have sent assistance to their Celtic kinsmen on the continent, and so attracted the wrath of Rome. Finally in A. D. 43 the systematic conquest of the island was begun by Agricola, and for the next three and a half centuries Britain was under Roman rule. The character of this occupation cannot be better described than in the words of Haverfield, the scholar who has shed most light on this difficult and obscure period. "From the standpoint alike of the ancient Roman statesman and of the modern Roman historian, the military posts and their garrisons formed the dominant element in Britain. But they have left little permanent mark on the civilization and character of the island. The ruins of their forts and fortresses are on our hill-sides. But, Roman as they were, their garrisons did little to spread Roman culture here. Outside their walls, each of them had a small or large settlement of womenfolk, traders, perhaps also of time-expired soldiers wishful to end their days where they had served. But hardly any of these settlements grew up into towns. York may form an exception. . . . Nor do the garrisons appear greatly to have affected the racial character of the Romano-British population."[1] Britain was prosperous for a time. Then towards the middle of the fourth century, troubles began; invasions from the north by the Picts and from the east coast by the Saxons grew more and more serious, until "finally, the Great Raid of Barbarians who crossed the Rhine on the winter's night which divided 406 from 407, and the subsequent barbarian attack on Rome itself, cut Britain off from the Mediterranean. The so-called 'departure of the Romans' speedily followed. This departure did not mean

[1] F. J. Haverfield in 1 *C. Med. H.* 370.

any great departure of persons, Roman or other, from the island. It meant that the central government in Italy now ceased to send out the usual governors and other high officials and to organize the supply of troops. No one went: some persons failed to come." [1] It is significant that sites which have been thoroughly explored fail to reveal Roman coins of later date than the opening years of the fifth century.[2] Before these invaders, towns were abandoned; Roman speech and boundaries vanished; only the massive foundations of the roads survived. The Britons retired to the hills of Wales and Scotland and there resumed their Celtic culture and speech, and became, in the fulness of time, one of the springs of art in the middle ages.

Of the three tribes who constituted the bulk of the invaders, two—the Angles and the Saxons—are hardly distinguishable either in language or customs, both coming, moreover, from the narrow neck of land which now separates Denmark from the mainland. From the end of the third century the Saxons appear in history as raiders and pirates, although the Angles, on the other hand, drop back into obscurity (as far as Roman writers are concerned) ever since Tacitus mentioned them in the beginning of the second century until the sixth century, when we read of them in England. They have left a mass of epic poetry, however, which gives some idea of the life their chieftains led; indeed, the similarities of this literature with that of Norway, Sweden and Germany suggest an international culture covering Northern Europe. The material remains of these tribes while still on the mainland, which have been unearthed, show a high degree of perfection in weaving, and that "the warriors of the period were armed in a manner not substantially improved upon for many centuries afterwards." Many of their swords bear the marks of Roman manufacturers. They had also a Runic alphabet of their own devising, which long remained in use. Of their religion little is known with certainty; Woden, Thunor, and Frig have given us the names of Wednesday, Thursday and Friday, but the surviving legends concerning them are too late to be used with confidence. As early as the Bronze Age they had been familiar with the plow.[3] The invaders must not be regarded as complete

1 F. J. Haverfield, *op. cit.*, 379.
2 *Ibid.*, 381. (The latest date seems to be about 420.)
3 F. M. G. Beck in 1 *C. Med. H.* 384–386.

savages, therefore. Of the Jutes much less is known. They were the dominant settlers in Kent and it is significant that the early Kentish laws have marked peculiarities of social structure, although the language differs but slightly. It is certainly curious how Kent from the beginning and all through the middle ages preserved peculiar local variants, but it must not be assumed too confidently that all this necessarily relates to an original difference in the Jutish invaders.

The invasion and settlement of the country by these tribes occupy about two centuries (roughly from 400 to 600). In the end, a number of different kingdoms were established—at least ten of them are known with certainty—and for the next two centuries after that the main themes are the spread of Christianity and the growth of unity in place of these warring kingdoms. The year 597 was a momentous one for England, for the arrival of St. Augustine established contact between the English tribesmen and the Roman Church which was now (under St. Gregory I, "the Great") definitely entering upon its mediæval task of establishing one supreme spiritual authority in Europe. Gregory "was a Roman of the Romans, nurtured on traditions of Rome's imperial greatness, cherishing the memories of pacification and justice, of control and protection." [1]

The results of the introduction of Christianity were of the highest importance. The existing tribal organization must have seemed weak and inefficient to the missionaries coming from such well-organized states as existed on the continent, and very soon we see the results of their teaching in the enhanced value placed upon the monarchy, and in the tendency towards larger national units. After long years of warfare the petty tribal units are replaced by a few large kingdoms ruled and administered by kings who watched European methods. Soon, too, they learned the Roman art of taxation, which consisted in dividing the land into units of equal assessment instead of equal area (calling them in English "hides"). Again, the advent of the clergy meant the introduction of a new class into English society, and so a new law of status had to be devised for their protection. Consequently laws were made, and, "in the Roman style," were written down. It is possible that legislation was occasionally effected upon other

[1] W. H. Hutton in 2 *C. Med. H.* 251.

subjects as well. And finally, the Church brought with it moral ideas which were to revolutionize English law. Christianity had inherited from Judaism an outlook upon moral questions which was strictly individualistic. The salvation of each separate soul was dependent upon the actions of the individual. This contrasted strongly with the custom of the English tribes which looked not to the individual but to the family group of which the individual formed a part. Necessarily such a system had little place for an individualistic sense of morals, for the group can hardly be credited with moral intention in the sense that an individual can. With the spread of Christianity all this slowly changed. First, responsibility for actions gradually shifted from the whole group to the particular individual who did the act; and then the Church (and later the law) will judge that act, if necessary, from the point of view of the intention of the party who committed it.

The Anglo-Saxon period is very long, and a great deal of development took place in it. Beginning for practical purposes about 597 (the landing of St. Augustine) we have a continuous stream of legal sources which are definitely Anglo-Saxon in character down to the Norman Conquest in 1066 and even later. There are treatises dating about the year 1118 which are still typically Anglo-Saxon in content and outlook.[1] We may therefore place the limits of this period roughly and in round figures between 600 and 1100, a period of five hundred years. The length of this age can be realized by remembering that five hundred years is the interval between Bracton and Blackstone, between Chaucer and Kipling, and between the battles of Agincourt and the Marne. In so long a period we must omit details. The one fact of capital importance besides the growing unification of England, is the coming of the Norsemen and Danes, for it has left definite traces upon our history. The very word "law" is not English but Norse. Scandinavia was peopled by peoples who were as astute in trade as they were fierce in war. The discoveries of English coins in the islands of the Baltic, together with Arabian coins from Bagdad and Samarcand (which reached the Baltic through Russia), are witness to the distant foreign commerce of the Norse. During the ninth century, for reasons unknown, the Norse became unusually active on the sea, and a series

[1] See below, pp. 20, 270–271.

of maritime raids resulted in the colonization of Iceland, parts of Ireland and Scotland, the Orkneys, Shetlands, Hebrides, and portions of Northern France (thenceforward to be known as Normandy). A Scandinavian tribe of "Rus" gave its name (although not its language) to Russia, while a few even penetrated to the Mediterranean. In England, after fierce fighting, they succeeded in retaining from King Alfred almost the whole eastern half of the kingdom (879), and more than a century after his death a Danish dynasty united under a single ruler—the great King Cnut (1016–1035)—England, Norway and Denmark. Cnut's laws were long popular in England, and in after years men looked back with respect to his reign, trying to revive his legislation. The Danes left a permanent mark on that part of the country where they had longest ruled. They independently developed a sort of grand jury, of which we shall speak later; they arrived earlier than the rest of the country at the stage where land could be freely bought and sold; they had a marked tendency to form clubs and guilds; their peasantry were less subject to the lords; borough institutions seem to have flourished peculiarly under their rule.[1]

The death of Cnut and the division of his Empire brings us to the accession of St. Edward the Confessor (1043–1066), who throughout the middle ages was the national hero of the English when they resented Norman influence. (Hence it is that a large body of "Laws of Edward the Confessor" was forged as a patriotic weapon against the Norman dynasty.) The spread of foreign culture in England increased immensely during his reign, which to some seems a sort of peaceful Norman conquest. The disputed succession on his death brought William the Conqueror in 1066 and Norman arms finished what Norman civilization had already begun.

[1] Vinogradoff, *English Society in the Eleventh Century*, 4–11; Corbett, in 3 *C. Med. H.* 401; J. E. G. de Montmorency, *Danish Influence on English Law and Character*, 40 Law Quarterly Review, 324–343. As for the jury, see below, pp. 97, 98.

CHAPTER II

THE CONQUEST TO HENRY II: THE BEGINNINGS OF ADMINISTRATION

The greatest result of the Norman Conquest was the introduction of precise and orderly methods into the government and law of England. The Norse invaders who had settled in Normandy had made it in a century and a half (911–1066) the best-ruled state in Europe, and the gifts for strong administration and for orderly accounting and finance which had been displayed in the duchy were to have fuller opportunities in the conquered kingdom. William the Bastard had been Duke of Normandy since 1035, and by 1047 (when he was twenty) the turbulent barons were beginning to feel his strength. Nearly twenty years of hard work in Normandy preceded the expedition to England, and in that interval William had imposed some sort of discipline upon his baronage, and had finally made peace with the Church (after a long quarrel) through the help of Lanfranc, whom he afterwards made Archbishop of Canterbury. Personally a devout Christian, he yet insisted that the Church should keep the place which he assigned to it, and in fact he secured an effective control over its policy, notably in appointments to the higher dignities. Then, too, he had developed a remarkably good financial organization called the Exchequer, and although the duchy revenues were not particularly large, yet there was clearly the machinery ready to collect revenue energetically and to control its disposition.

Such was the position of Duke William when he undertook the desperate adventure of invading England by transporting 5,000 men and 2,500 horses across the Channel, an astonishing performance in those days. The Battle of Hastings (1066) and the death of King Harold quickly settled him upon the throne of his new kingdom. Reforms began at once. The casual "treasure" of the Anglo-Saxon kings was reorganized as an Exchequer on Norman lines, and was used to keep a firm hold upon the sheriffs and local government generally. As for the Church, he continued the Norman attitude of strengthening the Church internally, enrich-

ing it and maintaining its discipline (newly reformed by the great Pope Gregory VII), although at the same time restricting its political power. This strongly contrasted with the pre-conquest state of things when the bishops sat in all the courts and mingled ecclesiastical and secular business. William, by an ordinance,[1] insisted that the bishops should not transact ecclesiastical business in the hundred courts, but should hold their own Courts Christian for the purpose; and from that day to this the Church has maintained its separate system of courts administering canon law. Church and State which had been inextricably connected in the Anglo-Saxon age henceforth were strictly separate, a policy which happened to coincide with the Church's own ambitions as well as with William's. His last years were absorbed in the great survey of the kingdom which is known as *Domesday Book*. The original two volumes together with the chest constructed for their preservation[2] are still in the Public Record Office in London where *Domesday Book* holds an honored place as the oldest public record. Indeed, during the middle ages it was so respected that it was called simply "the record," so great was its authority. The land was described county by county, village by village, the owners and their subtenants were listed and their holdings valued, even the farm stock was recorded, with a view to settling clearly the rights of the Crown and the taxable resources of the country. In several cases a few precious lines will summarize the customs of a county or city, and so give us an insight into the local law in force. Most valuable information can be extracted from it as to the state of freedom or serfdom in different parts of the country, and it is possible that the strict insistence of the Exchequer officials upon the letter of *Domesday Book*, and their refusal to allow it to be questioned, was the beginning of the notion of "record" as a technical thing. From this one book the idea of certain officially compiled documents being beyond question seems to have spread to the rolls of the Exchequer, and thence to the rolls of the courts of law. If this conjecture is true, then "Records" must be regarded as financial in origin, and only later becoming judicial.

[1] A translation of the ordinance will be found in Pound and Plucknett, *Readings*, 71.

[2] Photographs of them will be found in 3 Wigmore, *Panorama of the World's Legal Systems*, 1056. The whole work has been reproduced in facsimile.

Another effect of *Domesday Book* was to perpetuate the chain of feudal relationships and to assure the overlordship of the Crown. Thus the title of every piece of land in England could be expressed in the formula that A holds it of his feudal lord B, who holds of C, who holds of —— the King. This insistence of the Norman and succeeding kings that they were the undisputed lords, direct or indirect, of every piece of land in the country is of the gravest importance for it provided a sure foundation for the growth in later times of the common law. For this and many other reasons too technical to mention here, it has been declared that "if English law is to be understood, the law of *Domesday Book* must be mastered."[1] This opportunity of systematizing the land situation enabled the Conqueror to make England the most perfectly organized feudal state in Europe, and in this sense we may say that we are indebted to him for the feudal system. But he refused to allow the great barons whose tenure intervened between him and their sub-tenants to turn their position to political advantage, and one of his last acts was to assemble a great meeting (1086) at Salisbury where came all his counsellors "and all the land-owning men of property that there were all over England, whosesoever men they were, and all bowed down to him and became his men, and swore oaths of fealty to him that they would be faithful to him against all men"[2]—even against their immediate lords. In this way William tried to prevent the feudal anarchy and private war against which he had struggled for so many years in Normandy.

His work, then, was pre-eminently that of systematization. A few great reforms there were, but his greatest contribution was the Norman spirit of clever administration and orderly government, and his own stern enforcement of royal rights. Upon this basis was the common law to be built in later days. In other respects he was content to continue the old English laws and customs, expressing his policy in a brief but stately charter which is still preserved by the City of London:[3]

[1] Maitland, *Domesday Book and Beyond*, 3.

[2] *Anglo-Saxon Chronicle* cited in Stubbs, *Select Charters*. (There are numerous editions of this valuable source-book, but the page numberings do not correspond. As the texts are arranged chronologically they are easily found in any edition.)

[3] Stubbs, *Select Charters*. The Conqueror's work is well summarized by Corbett in 5 *C. Med. H.* 496, 505–520.

"King William greets in friendly wise William the bishop and Gosfrith the portreeve, and all the burgesses in London, both French and English. I let you wit that I will that you two be worthy of all the laws that you were worthy of in King Edward's day. And I will that every child be his father's heir after his father's day, and I will not endure that any man offer any wrong to you. God keep you."

Of William II (Rufus) there is little to say except that he rashly provoked a feud with the Church in which Archbishop Anselm suffered years of exile and "by his firmness set up a new standard of independence for the English clergy, and made the opening move in the struggle between Church and State in England." [1]

With the reign of Henry I (1100–1135) we come to a more important period of legal history. His first act was very significant. Just as the Conqueror had made the short promise of good government to London which we have just quoted, so his son Henry I issued a formal Charter in 1100 promising to stop the oppressive practices which his brother Rufus had introduced; then he chose as his queen Edith, who was a representative of the old English royal house, and so conciliated the English. His principal trouble (apart from a baronial revolt which was soon quelled) came from the Church which was growing anxious at the rapid rise of powerful monarchies which were apt to use the Church for political ends. Soon the issue became definite and Europe-wide in the form of the "Investiture Contest." The Conqueror had compelled the cathedrals to elect his nominees as bishops and had himself delivered to them the emblems of spiritual as well as of temporal authority. Gregory VII as early as 1075 prohibited lay investiture, holding that the Church was independent of the State, and that no temporal ruler could confer ecclesiastical authority. A long struggle followed which on the continent took the form of the spectacular struggle between the Empire and the papacy. In England Henry I and Archbishop Anselm had the moderating influence of the great canon lawyer Ivo of Chartres who devised a compromise in 1107; the King resigned his claim to invest bishops with the ring and staff (the emblems of their spiritual authority), while Anselm agreed that cathedral chapters should come to the King's chapel and elect bishops in his presence—thus leaving room for a reasonable

[1] Corbett, in 5 *C. Med. H.* 526.

amount of royal influence. This wise settlement was extended to all Europe only after much bitter strife in 1122. It is one of the central facts in mediaeval history, for it shows a clear-cut issue upon which a saintly man of Anselm's type would unhesitatingly decide that he had higher duties than those which he owed to the Crown. The Concordat of Worms of 1122 did not permanently end the dispute, which soon revived upon slightly different ground; indeed, in its most general sense the quarrel is likely to last as long as government itself. It has had important results upon the political theory of the State, some of the greatest minds of the middle ages having devoted their powers to the examination of the nature of kingship, the authority of law, and the limits which ought to be put upon the power of temporal rulers. Jurisprudence to-day bears the traces of these great events, through which the State was criticized in terms of the highest ideal of government which then existed, that of the universal Church.[1]

The rest of the reign is occupied with the peaceful activities of the Justiciar, Roger, Bishop of Salisbury, a Norman from Caen, who like so many of his race had something of the efficiency expert in his blood. Official tradition long respected him for his organization of the Exchequer on strict business lines, and to him we owe the series of "Great Rolls of the Pipe." The earliest in existence is dated 1130 and contains a vast amount of legal as well as financial information. Some of the earlier rolls must be lost; but with a few gaps there is an almost complete series of Pipe Rolls from 1130 down to 1832—a remarkable sign of the permanence of Roger's work. In this reign, therefore, we may place the elaboration of an efficient governmental organization at Westminster. In local government Henry I was equally active; eleven untrustworthy sheriffs were dismissed in 1129; justiciars were sent on circuit to look after the pleas of the Crown (and they soon usurped immense jurisdiction by asserting that any matter which concerned the peace could be treated as a plea of the

1 For the political history of the investiture contest see Brooke in 5 *C. Med. H.* 51–111; for the theory see a brief account in Dunning, *History of Political Theories, Ancient and Mediæval* 161–188, and more fully, Carlyle, *Mediæval Political Theory*, IV. 49–164. See also the brilliant lectures of A. L. Smith, *Church and State in the Middle Ages.*

Crown), while it is clear that the Norman sheriffs were still administering in the county what was essentially Anglo-Saxon law, for we have some curious treatises (written between 1113 and 1118) which are attempts to state that old law in language that the Normans could understand.[1] This in fact is the justification for the statement we have already made to the effect that the period of Anglo-Saxon law extended later than the Norman Conquest, and at least as late as the year 1100 or thereabouts. We therefore see that in the reign of Henry I the law was substantially Anglo-Saxon and administered by the sheriffs locally according to ancient custom (which was certainly not the same all over the country). As yet there was very little that could be called "common law." So far there was only a great administrative machine well on the way towards a complete domination of the realm. From this great machine there will develop the future common law.[2] Only in Sicily was such efficient administration to be found, and there too it was the work of Norman invaders.[3]

Henry's death was a great loss to the nation: "then there was tribulation soon in the land, for every man that could forthwith robbed another. . . . A good man he was and there was great awe of him. No man durst misdo against another in his time. He made peace for man and beast. Whoso bare his burden of gold and silver, no man durst say him aught but good." [4]

The reign of King Stephen (1135–1154) is frequently called "the Anarchy," so great were the disorders which filled it attendant upon the disputed title to the Crown. The machine which Henry I had perfected needed a firm hand to run it, and Stephen was content to let things drift. Art and letters, indeed, flourished, and Vacarius came to Oxford to teach Roman law and to write a less expensive text book for poor English law students,[5] but from the point of view of Norman efficiency the reign was disappointing: still, "to those who do not place order above everything and who realize how oppressive Henry's government was becoming in spite of its legality, it must always remain a moot

[1] See below, pp. 177, 178.

[2] For Henry I see in general Corbett in 5 *C. Med. H.* 527–541.

[3] For Sicily, see Chalandon in 5 *C. Med. H.* 203–206.

[4] Anglo-Saxon Chronicle, in Stubbs, *Select Charters*.

[5] This book, the *Liber Pauperum*, has just been edited for the Selden Society by Professor de Zulueta.

question whether Stephen's reign was such a total set-back as the ecclesiastical writers of the day would have us believe." [1]

With his successor, Henry II, we come to one of the most critical epochs in the history of the common law. By inheritance or by marriage he had acquired the rulership of England, Normandy, Aquitaine and Anjou, and like many of his barons divided his time between England and the continent. This close connection with France was to have important results for English law as we shall see later. Whatever the lessons of Norman public administration, the revival of learning now in progress may have brought broader views and more generous ideals. Stubbs has made the attractive suggestion that perhaps the rapid growth of the universities "conduced to the maintenance in the educated class of an ideal of free government, drawn from ancient Greek and Roman history, which, although never likely to be realized in detail, tended to make tyranny such as that of William Rufus impossible." [2] It must never be forgotten that the general standard of learning and culture of a nation has a large part in determining its law and polity.

The reign opens (1154) with the confirmation of Henry I's Charter of 1100, and with the great conflict between the King and Archbishop Becket. The separation of the ecclesiastical courts by William the Conqueror had had unexpected results, for in the succeeding hundred years the Church had developed a large mass of canon law and claimed wide jurisdiction. This law Becket determined to apply rigorously. Henry was equally determined to impose his own lay law (which also had recently been considerably enlarged in content and strengthened administratively). Many people were amenable to both jurisdictions, and Becket proclaimed that such people should not be tried twice—in other words, they should be tried but one, and that in the Church courts. Then certain things also were subject to both jurisdictions—Church lands, and the rights of ecclesiastical patronage (called advowsons). Finally, at a council in 1164 all the magnates of the realm "recognized" (the word is borrowed from the "recognition" or verdict of a jury) a list of customs which

1 Corbett, in 5 *C. Med. H.* 552.
2 Stubbs, *Select Charters* (Sketch of the Reign of Henry II).

they declared were the practice of the reign of Henry I. This statement, called the Constitutions of Clarendon, Henry II proposed as the basis of a compromise.[1] Some of these provisions repeat practices dating from the reign of William I, such as in requiring the King's permission before a tenant-in-chief can be excommunicated, or an appeal carried from the Church courts in England to Rome (cc. 7, 8, 10). Chapter 13 introduces the striking rule that a lord shall be held responsible by the King if his servants do wrong to a bishop. All litigation concerning advowsons is to be in the King's court (c. 1), and so also cases involving the Church's lands unless they be held in free alms (a tenure peculiar to Church property), but the fact of free alms or lay tenure is to be decided in the King's court—which had been the rule in Normandy as well (c. 9). Chapter 15 contains the highly important rule that no plea of debt shall be withdrawn from the King's jurisdiction on the grounds that the debt was accompanied by an oath or pledge of faith—spiritual censures may be imposed for breach of faith, but the civil jurisdiction over debt is not to be thereby ousted. This clause was not an unmixed benefit, for although the state thereby appropriated to itself a large jurisdiction over contract, nevertheless the law of the Church in this field was rapidly becoming more modern, more equitable and less formalistic. She had long punished breach of faith as a crime, and was soon to extend the idea and proclaim in addition the enforceability in law of promises (opinions to this effect appear first in 1212.)[2] The common law took four hundred years getting that far.[3] Finally, it was declared by Chapter 3 that clerks (that is to say all who were in major or minor orders) when under accusation of crime, should first answer in the King's court, and then be remitted for trial by the bishop, and if he convicted, then they were to be returned to the lay court for punishment, for Henry insisted that degradation (the severest penalty the Church could inflict) was too mild for felonies. Last of all, Henry objected to laymen being tried in ecclesiastical courts, even for

[1] For a translation of parts of the Constitutions see Pound and Plucknett, *Readings*, 72–75.

[2] Spies, *L'Observation des Simples Conventions en Droit Canonique* (1928), 40ff.

[3] *Slade's Case* (1602), 4 Rep. 92.

canonical offences, upon secret informations. So he offered the bishops the aid of a sheriff's jury of presentment if the Church could find no other means of getting a public accuser.[1]

This compromise on the basis of old customs was effective, except as to the punishment of convicted clerks. On this point Henry had to yield after the murder of Becket, and thenceforward "benefit of clergy" gradually began to operate as a sort of first offender's law, for the culprit escaped punishment for the first offence on proving his clergy. This soon meant performing the simple formality of reading (or pretending to read) the "neck-verse" from the Psalms. Later still, pleading clergy was sometimes accompanied by branding, and so if ever the offender committed a second crime it was easily seen whether he had been convicted before. Benefit of clergy was common in America in the eighteenth century, being even extended to women.[2]

After the dramatic murder of Becket the interest turns to the rapid development of the administration under Henry II's officials. The Treasury was under Nigel, Bishop of Ely (a nephew of Henry I's Justiciar Roger, Bishop of Salisbury), who further elaborated its constitution and procedure. Finally, having bought the office of Treasurer he conferred it upon his son, Richard fitz Nigel, Bishop of London, who wrote an extremely detailed account of the working of the Exchequer called the *Dialogue of the Exchequer* (1177–1179).[3] The last ten years of the reign are dominated by Ranulf de Glanvill, the Justiciar. A competent general, diplomatist and judge, although an unscrupulous sheriff (he was twice removed from office), he deserves the credit of having written, or at least, inspired his nephew Hubert Walter, later Archbishop of Canterbury, to write, the first treatise upon the Common Law. The date is soon after 1187. It is a short, simple book, for the common law was neither very extensive nor very complicated. But for all that, it set the style of legal literature

[1] See Pound and Plucknett, *Readings*, 73 n. 1 for references to the explanations of Maitland and Haskins which seem less satisfactory than the above.

[2] For a collection of cases upon it see Baker in 15 *Kentucky Law Journal*, 111–113.

[3] For some extracts from it see Pound and Plucknett, *Readings*, 59, 81–82. The treatise was revised at later dates it seems; see Richardson, 43 *English Historical Review*, 161, 321. The Treasury remained in the same family for six reigns running.

for many centuries to come, for the author of Glanvill invented the method of writing law in the form of a commentary upon the different writs.

There are many other great events of this reign which we shall describe more fully in later chapters of this book. The extension of the system of itinerant justices; the growing definition of the courts of law; the widespread use of the jury; the establishment of the assizes [1] as speedy methods of trying cases of recent dispossession of land; the Assize of Clarendon (1166) remodelling criminal procedure and systematizing the presenting or grand jury; [2] the Assize of Northampton (1176) which strengthened the claims of an heir to land against the feudal lord; the Assize of Arms (1181) which re-organized the local defence and police measures —these are only the greatest of the many reforms of Henry II's reign. In the words of Bishop Stubbs:

"Henry II was far more than an inventor of legal forms or of the machinery of taxation. He was one of the greatest politicians of his time; a man of such wide influence, great estates, and numerous connections, that the whole of the foreign relations of England during the middle ages may be traced directly and distinctly to the results of his alliances and his enmities. He was regarded by the Emperor Frederick, by the Kings of Spain and Sicily, by the rising republics of Lombardy, by the half-savage dynasts of Norway, and by the fainting realm of Palestine as a friend and patron to be secured at any cost. He refused the crowns of Jerusalem and Sicily; he refused to recognize the anti-pope at a moment when the whole influence of the papacy was being employed to embarrass and distress him. His career is full of romantic episodes, and of really great physical exploits.

"Yet the consent of the historians of the time makes him, first and foremost, a legislator and administrator. Ralph Niger, his enemy, tells how year after year he wore out men's patience with his annual assizes; how he set up an upstart nobility; how he abolished the ancient laws, set aside charters, overthrew municipalities, thirsted for gold, overwhelmed all society with his scutages, his recognitions, and such like. Ralph de Diceto explains how necessary a constant adaptation and readjustment of means was to secure in any degree the pure administration of justice, and lauds the promptness with which he discarded unsatisfactory measures to make way for new experiments. William of Newburgh and Peter of Blois praise him for the very measures that Ralph Niger condemns;

[1] For the different meanings of the word *assize*, see below, p. 145.
[2] For a translation and comments, see below, pp. 147–149.

his exactions were far less than those of his successors; he was most careful of the public peace; he bore the sword for the punishment of evil doers, but to the peace of the good; he conserved the rights and liberties of the churches; he never imposed any heavy tax on either England or his continental estates, or grieved the Church with undue exactions; his legal activity was especially meritorious after the storm of anarchy which preceded. In every description of his character the same features recur, whether as matters of laudation or of abuse."[1]

[1] Stubbs, *Constitutional History*, § 147.

CHAPTER III

THE GREAT CHARTERS: LAW SEPARATES FROM ADMINISTRATION

Henry II was followed successively by his sons Richard I (1189–1199) and John (1199–1216), and his grandson Henry III (1216–1272). During these reigns every sort of strain was placed upon the administration and upon the infant common law. It is a great tribute to his work that they both survived. Richard was absent from the realm for almost the whole of his ten years' reign; John was involved in disastrous war abroad, civil war at home, insurrection, invasion and interdict. Henry III was a child of nine at his accession, with only his mother's bracelet for a crown, and yet a few great-hearted nobles, encouraged by the paternal interest of Pope Innocent III, spared the land most of the troubles which usually attended a minority in those days. And soon, by the middle of Henry's reign, one of his judges, Henry de Bracton, was already preparing material for an immense and detailed treatise on the common law beside which the little book of Glanvill would seem a mere pamphlet, and he tells us that the best cases are those in the earlier years of the reign—so flourishing was the law even in those troubled times. The secret is surely to be found in the permanence of the administration established by the Norman kings, which withstood all these shocks, grew, prospered, and finally (as every administration must) became the parent of new law, and of new legal machinery.

Then, too, the Crown through all these disasters survived the attempts of certain interests which would have reduced its power to ineffectual limits; on the other hand the opposite tendency of the Crown to use the powerful machinery of government to institute a tyranny was likewise frustrated. And so, on a broad view, both the oppressions and the rebellions of the period appear as efforts to reach and maintain the just mean between private liberty and public order, while through it all, steadily and constantly, proceeds the growth of better and more expert judicial institu-

tions, and the development of more and more rules of law, and their organization into a coherent legal system which already was beginning to separate from the purely administrative machinery of the realm. By the time we reach the second half of Henry III's reign the judiciary is already distinct from the administration and can stand aside while the national leaders in arms assert the necessity of imposing restraints upon the speed and the direction of so dangerous an engine; while very soon, Parliament will appear with this as one of its main duties.

Of all the threads which run through this period, many of them highly important, we shall here follow only one—the struggle for the charters. The absence of Richard I had shown that it was possible for the machinery to work without a king to direct it, provided that there was a trusty minister to take his place. The great Archbishop Hubert Walter took this rôle, and assisted by the great council of magnates ruled well, retaining his power into the next reign. The brilliant outburst of literature, art, law and general culture which marked the close of the twelfth century was accompanied by the development of an idea of government of which Hubert Walter[1] was the embodiment. "King John, in fact, felt with much truth that he was not his own master so long as his great minister was alive. Hubert Walter held the view, natural in an ecclesiastical statesman, that the kingship was an office invested with solemn duties. Royal power must be inseparable from the law. And the Archbishop's prestige was so great that a word from him on the interpretation of the law could set aside the opinion of the King and his advisers."[2] His successor, Stephen Langton, whom Pope Innocent III forced John to accept, was of the same school, holding that "loyalty was devotion, not to a man, but to a system of law and order which he believed to be a reflection of the law and order of the universe"[3] Conflict was inevitable between such statesmen and John, whose life had been spent in constant turbulence, intrigue and treachery, with complete indifference to "those principles of harmony in life and nature which underlay all the current belief in justice and re-

1 Remember that it may be his hand which is concealed beneath the name of Glanvill in the first book of the common law. Above p. 17.

2 Powicke in 6 *C. Med. H.* 218.

3 *Ibid.*, 219.

sponsibility."[1] The rapid growth of the central administration and the development of the courts of law (which we shall consider in more detail later[2]) was only equalled by the growth of local government, of boroughs, of trade both internal and foreign, and the close co-operation of central and local authorities. Litigation, negotiations, compromises, definitions of official power, the statement of precise limits to all sorts of jurisdictions public and private, organization between groups of towns and the elaboration of machinery for holding international representative chapters in certain religious bodies—these are all signs of the spirit of legal order which filled the opening years of the thirteenth century. It is from this standpoint that the events leading to *Magna Carta* must be considered.

John's troubles opened with Innocent III's refusal to permit his candidate to become Archbishop of Canterbury, the Pope substituting his own much better choice, Stephen Langton. The Great Interdict followed, to which John replied by confiscating Church property. The political thought on both sides of the struggle is clear. John regarded bishops as higher civil servants, and looked back to the old days when Church and State in England were mingled, the papacy weak, and the Church subservient to the Crown. Hence he was able to take the attitude of a patriot against foreign meddling. Langton started by assuming the separate sphere of Church and State, attacked the shifty details of John's recent conduct, and proclaimed that John's vassals were not bound to him after he himself had broken faith with the King of Kings, arguing "as an exponent of feudal custom in the light of those high principles of law to which all human law should conform."[3] The conflict was thus one of fundamental principle. John poured out money in Europe to buy support, and built up an imposing coalition against the Pope's ally, King Philip Augustus of France. Then in his customary sudden manner, he abandoned all his plans, submitted to Rome, and did homage to the Pope's legate. The next year his allies were ruined in one of the most important battles of the middle ages (Bouvines, 1214). It was now time to reckon with the discontent aroused by the reck-

[1] *Ibid.*, 220.
[2] Below, pp. 125 et seq.
[3] Powicke in 6 *C. Med. H.* 234.

less oppression to which John had resorted during the Interdict. Archbishop Langton undertook to force the King to make amends, and produced the old Charter of Henry I as the basis of what was normal and just, adding a long list of more recent grievances. London opened its gates to the barons, and on the fifteenth day of June, 1215, John had to put his seal to the Great Charter.

This is a long document of sixty chapters and represents the extreme form of the baronial demands. The next ten years saw the progressive shortening of the Charter by omitting much that was temporary, by putting the important clauses concerning the forests into a separate document (called the Charter of the Forest), and by pruning the excesses of the victorious barons. John, who was now supported by his new over-lord, the Pope, repudiated the charter immediately. Indeed, some of its provisions were much too extreme, particularly the last, which erected a commission of twenty-five barons with power to enforce the Charter by making war on the King. The Great Charter of 1215 was therefore actually law for only about six weeks. The king died shortly after (1216). The council who ruled in the name of the infant Henry III re-issued the charter in 1216 (this time with papal assent) very much modified in favor of the Crown, with a promise to re-open the question when the French invasion, undertaken at the will of the rebel barons, had been defeated. This promise they fulfilled in 1217 on the occasion of the treaty whereby Prince Louis withdrew, and this, the third, Great Charter contains "numerous, important, and minute" changes whose general tendency was again in favor of the Crown. It was felt that the boy King ought not to suffer for his father's sins, and that the difficult period of a minority was no time to weaken the central government; in any case, it was a committee of nobles who actually ruled in Henry's name and any limitation on his power would only make their task of governing the harder. Hence the successive compromises of 1216 and 1217. At length, in 1225, Henry III came of age and issued the fourth Great Charter which differed from the third in slight details only. This is the document which is still law (except in so far as it has been repealed) and is cited by the old authors as the charter or statute of the ninth year of Henry III. It was enrolled on the statute roll (word for word, except one slight slip) many years later in 1297, and so is also

sometimes cited as the statute *Confirmatio Cartarum* of twenty-five Edward I. On numerous later occasions during the middle ages it was solemnly confirmed and from that day to this has been held in the deepest respect both in England and in America. After all these revisions *Magna Carta* as it now stands on the statute books of common law jurisdictions is a sober, practical, and highly technical document. A complete understanding of all its provisions would require a whole volume upon numerous aspects of mediæval law and administration; for our present purpose the following summary will suffice.[1]

Constitutional Provisions.

"First, we have granted to God, and by this our present charter have confirmed for us and our heirs for ever, that the English Church shall be free and shall have all her rights and liberties, whole and inviolable. We have also given and granted to all the freemen of our realm, for us and our heirs for ever, these liberties under-written, to have and to hold to them and their heirs, of us and our heirs for ever" (Chapter 1; note the formulas of a conveyance of real property which are here used).

"The City of London shall have all her old liberties and customs. And moreover we will and grant that all other cities, boroughs, towns . . . and ports shall have all their liberties and free customs" (Chapter 9).

"No freeman shall be taken or imprisoned, or disseised of his free tenement, liberties or free customs, or outlawed or exiled or in any wise destroyed, nor will we go upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land. To none will we sell, deny, or delay right or justice" (Chapter 29). These words have provoked centuries of discussion. Originally, it seems, "the law of the land" covered all the usual modes of trial, whether it be by indictment, petty jury, appeal or compurgation. "Trial by peers," on the other hand, was undoubtedly an importation from continental feudal law, and was the solemn trial of a vassal by his fellow-vassals in the court of their lord.[2] It has always been rather rare, and is apt to have a political aspect. King John himself was tried by his peers in the court of King Philip of France who was his over-lord in respect of the lands held by John in France. In certain cases an English peer can still claim to be tried by members of the House of Lords, either in Parliament or in the Court of the Lord High Steward. As time went on the phrase was given a newer and wider meaning. We find for example that a knight accused of felony will claim successfully a jury composed of knights.[3] Later still the notion will get abroad that "trial by peers" means trial

[1] The traditional views are expressed in Coke's commentary in the *Second Institute*; the modern learning is in McKechnie, *Magna Carta* (2nd edition).

[2] Powicke in *Magna Carta Commemoration Essays*, 96–121.

[3] *Y. B. 30 & 31 Edward I* (Rolls Series), 531.

by jury, which it certainly did not at the time when the charter was first made.

The Regulation of Feudal Incidents.

The numerous feudal incidents of relief, wardship, marriage, and the rights of widows, were regularized to prevent the oppression which had grown up during the reign of King John. These reforms applied also to the relations between the barons and their undertenants, and form the basis of a great deal of feudal law (2–6, 10).

Restraints on the Prerogative.

"The writ called *praecipe* shall not be used in the future to deprive any lord of his court"[1] (Chapter 24). Purveyance and the forfeiture of lands for felony were likewise regulated.

The Regulation of the Courts.

"Common pleas shall not follow our court but shall be held in some certain place" (Chapter 11). The taking of the assizes was ordered for regular terms every year and was to be in the proper counties. Sheriffs were forbidden to hold pleas of the Crown. The County Court was also regulated and ordered to be held not more than once a month (Chapters 11–14, 17, 28, 35).

The Law of Land.

The rights of widows were protected and land owners were forbidden to alienate so much of their land that the lord of the fee suffered detriment; and finally, collusive gifts to the Church (which were frequently made in order to evade feudal service) were forbidden.

Trade and Commerce.

The sureties of the King's debtors were not to be liable until after the default of the principal debtor, and were to have the lands of the debtor until they were satisfied for what they had paid for him. There was to be one system of weights and measures throughout the land, and foreign merchants were to be allowed free entry except in war-time, their treatment depending upon the treatment of English merchants abroad.

From this it will be seen that the provisions of the Great Charter which became permanent were those of a practical nature, while the revolutionary machinery invented by the barons to supersede the Crown was quickly dropped as unworkable and contrary to the current of English history.

The Great Charter was by no means unique in European history. Many kings and nobles about this time were granting charters to their tenants and subjects, and their general character was not dissimilar even in different countries. It has even been suggested that Spanish influence can be traced in our own Charter.[2]

1 As to this, see below, p. 403.

2 Altamira, in *Magna Carta Commemoration Essays*, 227–243.

In 1222 Hungary obtained a very similar charter.[1] The difference between the English Charter and these other documents lies not in its contents but in the use made of it in subsequent history. The Charter gradually grew bigger than the mere feudal details which it contained and came to be a symbol of successful opposition to the Crown which had resulted in a negotiated peace representing a reasonable compromise. As time goes on, therefore, the Charter becomes more and more a myth, but nevertheless a very powerful one, and in the seventeenth century all the forces of liberalism rallied around it. The great commentary upon it by Sir Edward Coke in the beginning of his Second Institute became the classical statement of constitutional principles in the seventeenth century, and was immensely influential in England, America, and later still in many other countries as well.[2] To explode the "myth" of the Great Charter is indeed to get back to its original historical meaning, but for all that, the myth has been much more important than the reality, and there is still something to be said for the statement that "the whole of English constitutional history is a commentary upon the Great Charter."

Its immediate result, apart from the reforms contained in it, was to familiarize people with the idea that by means of a written document it was possible to make notable changes in the law. Within the period of ten years, four successive charters had made numerous changes in law and procedure. Was not this an indication that many other difficult questions might be settled in a similar manner? And as a matter of fact we soon find a stream of legislation beginning to appear, which we shall describe later.

The rest of the reign of Henry III is notable chiefly for the revolt of the barons in 1258, which repeats the main outlines of the revolt against King John. The results also were similar. A revolutionary organization was set up by the barons with the idea of reducing the Crown to complete powerlessness; and this, like the previous attempt in 1215, had soon to be abandoned. But in this later struggle the barons had been dependent to a considerable extent upon the assistance of smaller land-owners who also had

[1] It is translated in Sayous, *Historic Générale des Hongrois* (1900), 116–121.

[2] See Hazeltine, the *Influence of Magna Carta on American Constitutional Development* (*Magna Carta Commemoration Essays*), 180–226; also printed in 17 Columbia Law Review.

to be satisfied by a measure of reform. These reforms were embodied in the Provisions of Westminster (1259) and after the close of the Civil War most of them were regularly enacted as the Statute of Marlborough (1267). Of this highly important statute we shall say only one thing, and that is that the reforms which it contained represent the demands of the smaller land-owners against the greater nobility, and that there is a great deal of truth in the words of Maitland that "this statute in many respects marks the end of feudalism."

CHAPTER IV

EDWARD I TO RICHARD II: STATUTES AND SOCIAL REVOLUTION

We now come to a period of steady growth in the common law covering just over a century and a quarter (1272–1399). The reign of Edward I is marked by the greatest outburst of reforming legislation in English history until the nineteenth century. The first Statute of Westminster (1275) made numerous changes in procedure, many of them designed to protect the subject against the King's officers. It may be regarded in some ways as being a sort of supplement to the Great Charter, which was now fifty years old. The Statute of Gloucester (1278) made important amendments to the law of land, especially on the subjects of waste, curtesy and dower. The next year the great Statute of Mortmain did a great deal to check the feudal losses which resulted when land was given to churches, monasteries and corporate bodies, by requiring a royal license to amortize. In 1284 we have a remarkable statute re-stating the fundamentals of the common law for the information of sheriffs who were engaged in applying English law to the newly conquered land of Wales. This statute is so long that it almost amounts to a short treatise on the state of the law in 1284; its practical interest to historians is therefore considerable, for it contains information which is difficult to find elsewhere.

The next year (1285) saw an astonishing series of epoch-making statutes. Of these the first was the second Statute of Westminster, which leaves hardly a single department of the law untouched. Of its fifty chapters, the first is the famous *De Donis* of which we shall have much to say later on, for it is the foundation of the idea of legal estates in land. Among many others are the following: The common mode of fraudulently conveying land by allowing judgment to go by default in a collusive action brought for the purpose was checked.[1] The rights of joint-tenants

[1] This device was invented in order to convey the property of a married woman against her will, and to enable life tenants to defeat reversions, etc.

and reversioners were given more prompt protection in such cases, and it was enacted that this device should not bar a widow's claim to dower. By chapter 9 a very stringent process was created for the action of account. In its origin it dealt with the relationship of the lord of a manor to his bailiff or estate manager, but as history proceeds it becomes a commercial as well as a feudal action, and is the regular remedy lying between partners. The statute imposes imprisonment as soon as an accountant is found in default, and this penalty can be inflicted by the lord's auditors without the intervention of a court. Equally drastic is the penalty upon the sheriff or gaoler if such a prisoner escapes, for in such a case the gaoler shall be liable to the lord in the same sum as the accountant was. This perhaps is a reflection of the insecurity of mediaeval prisons, which were by no means so massive as is sometimes thought. Chapter 18 established the writ of *elegit* whereby a judgment creditor could, as an alternative to the old *fieri facias*, elect to take all the debtor's chattels and half of his lands until the debt be levied out of the chattels and the rent. Chapter 24 contains the famous provision that—

> "whensoever from henceforth it shall happen in the Chancery that there is to be found a writ in one case, but not in another case although involving the same law and requiring the same remedy, the clerks of the Chancery shall agree in framing a writ, or else they shall adjourn the plaintiffs to the next Parliament, or else they shall write down the points upon which they cannot agree and refer them to the next Parliament, and so a writ shall be framed by the consent of the learned in the law; to the end that the court from henceforth shall no longer fail those who seek justice."

Here indeed is laid down a regular procedure for the steady expansion of the law by the enlargement of the available writs as circumstances may require. It is clear the Chancery clerks did not regard this statute as giving them wide powers of creating new forms of action, for where we find the chapter invoked at all (and it is not very often) it is used with great caution. In fact, the large part assigned to Parliament in the chapter shows that it was the general feeling that matters of legislative importance ought to be handled there. In the fourteenth century, moreover, parliamentary proceedings were often extremely informal, and are by no means always recorded on the rolls; consequently it is most likely that these statutory powers were exercised, if at all,

by the little group of administrators and lawyers who formed the kernel of the fourteenth century Parliaments. Very soon it appears, however, that the statute rolls seem regularly to contain express declarations in legislative form as to the extension of old writs to new cases, and it may well be that the form of a statute was chosen because the publicity attaching to it made the reform more quickly effective.

Chapter 31 relates that it sometimes happens that parties who allege an exception which the court over-rules have difficulty when they attempt to test the lawfulness of the decision by a writ of error, because the court may not have enrolled the unsuccessful exception. The higher court is therefore unable to pass upon the matter because it is not on the record before them. To remedy this, the statute allows such exceptions to be written down in a "bill" to which the trial judge must affix his seal. If the exception is not enrolled, then the "bill of exceptions" is to be sufficient record for proceedings in error. The chapter shows that the roll is still under the absolute control of the court, which can include or exclude matters in its discretion; it is not surprising that judges said many hard things against the new "bill of exceptions" and more than once flatly refused to seal them.

Chapter 30 regulated the new system of *nisi prius* justices, who become more important in practice as a result of many succeeding statutes amending the system in details. In this way it became less necessary for juries from remote parts of the country to undertake the slow and costly journey to Westminster. In the same year the Statute of Winchester established a system of police by compelling citizens to possess armor according to their means for the defence of the peace. Then the Statute of Merchants (also of 1285) established a system of recording debts and of making land liable to execution, which lasted down to the eighteenth century with some modifications.[1] In 1290 we find the great Statute *Quia Emptores* which has been rightly called one of the pillars of real property law.

The burden of foreign war and the Crown's growing need for money provoked a good deal of unrest, and finally, as the price of a heavy grant of taxes, the King had to confirm the Charters.

[1] The earlier Statute of Acton Burnell (1283) was less stringent.

It was on this occasion (1297) that the Great Charter was first enrolled among the public archives.

The troubles which began in the reign of Edward I became chronic under his son, Edward II (1307–1327), and once again an attempt was made by a series of "Ordinances" (1311) to put the Crown under the domination of a group of barons. The tragic ending of the reign and the mysterious death of the unfortunate Edward bring us to the reign of his son, Edward III (1327–1377), and a period of fifty years of uneasy tension. Once again we find the Charters solemnly confirmed in 1352. The middle of his reign was marked by a series of fearful calamities which have left their mark upon society and the law. The nation was already weakened by a succession of famines when the arrival of the Black Death (1348–1349) from the East wrought a revolution in social and economic conditions. The terrible mortality from this plague completely disorganized the manorial system, which had hitherto depended upon a plentiful supply of labor born and bred within the manor. The plague accelerated and intensified forces which were already at work, and the result was a very serious depletion of the labor market. The population of the manor was no longer sufficient to work the lord's estates. Consequently lords began to compete among themselves for such free labor as was available. This tempted servile inhabitants of manors to leave their holdings and become hired laborers. So keen was the competition that a series of ordinances and statutes beginning in 1349 regulated for the first time the relationships between master and servant, and provided machinery for the establishment of scales of wages above which any payment would be unlawful. This system depended largely for its operation upon the work of a comparatively recent institution, the justices of the peace, and remained in force at least as late as the eighteenth century.

The situation culminated in the next reign in the Revolt of the Peasants of 1381. Into the long controversy over the causes and character of this rising we cannot enter at this moment, but very briefly stated, the history of the revolt may be summarized like this. In the first place, it is clear that the old theory which saw the cause of the revolt in a supposed attempt by landlords to reimpose the conditions of serfdom after having first abandoned

them is no longer tenable. It seems rather that in this, as in many other revolts, the motive of the movement was not so much a blank despair as a certain hopefulness. It is not in the depth of the night that social revolutions occur, but with the first gleam of dawn. The economic results of the Black Death had already brought a considerable improvement in the lot of the agricultural laborer, and it was the disappointment that this improvement had not been spread more equally among the masses, or proceeded more rapidly, that provoked the impatient peasants to rebellion. The insurgents were mainly those who had not yet been able to establish their position as free laborers, and their hatred was principally directed against the lawyers and the stewards who kept manorial records. Wherever possible the rebels destroyed the manorial rolls which contained the legal evidence of their servitude. The parochial clergy seem to have viewed the movement with considerable sympathy, although the higher ecclesiastics were markedly indifferent. It is now clear, moreover, that the ideas of the early reformer Wyclif played very little part in the movement, although it is certainly true that there were active agitators who were preaching a somewhat crude form of communism. Several independent risings occurred in different parts of the country, and one body of rebels was welcomed by the mass of the Londoners who were at odds with the mayor. A serious massacre took place in the streets of the city, and the rebels beheaded John Cavendish, Chief Justice of the King's Bench, the Archbishop of Canterbury and the Lord Treasurer.

It is very difficult to find any clear results of the revolt. Indeed, the latest opinion tends to lay stress upon the ineffectiveness of the whole movement. It was one of the very few occasions in English history when a definitely social, as distinct from a political, revolution, was proposed, and its failure was immediate and complete. Fortunately, the natural movement towards the emancipation of villeins, which had long been in progress, continued as before the revolt, and during the following century a great silent revolution slowly took place. The majority of the populace who had been serfs gradually acquired economic independence. Lords of manors who could no longer find servile labor, either leased their lands to free laborers (or to laborers who were soon to become free), or else tacitly conceded to their peasants the bene-

fits of ownership in their holdings. This latter process is truly remarkable, and deserves close attention from students of legal history. Through the machinery of custom, which was always a powerful influence for experiment or change in the middle ages, the rightless villein slowly acquired customary property rights in the land he worked. For a long time the common law refused to recognize this process, and it was to the courts of equity that the customary tenant, or copyholder as he was later called, looked first for protection.[1] In the early seventeenth century Sir Edward Coke took up the cause of the copyholders, and finally extended to them the protection of the common law courts. In this way those sweeping and violent social revolutions which we have seen in France and Russia were avoided in English history through the slow adaptation of the law to new social conditions, no doubt assisted by the lack of a precise definition of property, while the willingness to tolerate for a time a few anomalies helped to accomplish by peaceful means the great task of transforming the ancient serfdom into a class of free workers.

Throughout this period we find the steady growth of the legal profession and the development of a remarkable series of law reports called "*Year Books*" which we shall describe later. Then, too, Parliament becomes more definite in its composition and gradually takes its place as the ultimate court in the land, as a national legislature, and as a representative body which could give voice to the feelings of the nation when the Crown or its ministers incurred its dissatisfaction.

The death of the old King Edward left the succession to his grandson, Richard II (1377–1399), who is one of the most picturesque and puzzling figures in English history.[2] The troubles in his reign (apart from the Peasants' Revolt) were ultimately of a dynastic character, turning upon the conflicting claims of the Houses of York and Lancaster to succeed. Richard's tactless policies gave an opportunity to the House of Lancaster to steal a march upon the Yorkists, and the result was the deposition, and soon the mysterious death, of Richard II in 1399.

1 For a summary of the legal problem see *Y. B. 13 Richard II* (Ames Foundation, ed. Plucknett), xxxii–xliii.

2 Professor Tout has just given a remarkable history of the reign from a novel standpoint in his *Chapters in Administrative History*, volume IV.

CHAPTER V

THE FIFTEENTH CENTURY: THE PROBLEM OF ENFORCEMENT

Henry IV, who began the line of Lancaster in 1399, together with his descendants, Henry V and Henry VI, were all under the same disability, that is to say, kings by a doubtful title. They were therefore dependent to a large extent upon the series of family alliances and political factions which had placed them upon the throne, and in consequence we have what has been called the "Lancastrian experiment." The experiment seems to have consisted in associating a fairly large body of nobles with the daily business of government, and so the chief characteristic of the fifteenth century is the important place occupied by the Council.

"Practically the first public utterance of the new dynasty was its founder's pledge to be governed by the counsel of the 'Sages and Ancients of the Realm,' and when, three-quarters of a century later, the line had ended in violence and exile, the last echo of its departed polity was heard in Fortescue's plea for more 'counsel.' Time after time, Parliament prayed for 'sufficient counsel,' and as often did Henry IV inform them of the names of his advisers and swear them to be upright and true; later, in the troublous times of his grandson, it is still the Council which was the storm center, the Council's dissensions which raged round the child King's throne, and the Council's collapse which eventually wrought his ruin. To appreciate how intimately the fortunes of the Council were bound up with those of the nation itself, it is well to consider how widely its ramifications spread throughout the body politic; Parliament, Chancery, Exchequer, law courts—all these still remained so closely connected with the parent body, as represented by the group of men nearest the King, that it is difficult to determine at what period, and to what extent, one should regard them as separate institutions. This interpenetration of the various government departments by the Council can be regarded as the administrative aspect of the growing political supremacy of the Crown. For centuries the Crown was steadily gathering strength and building up a political unity out of the discordant elements of feudalism. One King was to be felt at work throughout the realm, and as the task grew heavier, it was one Council which ensured the smooth working of the various organs of the administration. As a result, the fifteenth century possessed as highly centralized a consti-

tution as one could expect to find, considering that communications — the nerves of a bureaucracy — were still so tardy; such machinery as did exist, however, was to a striking degree amenable to Council influences, and at times subject to Council control." [1]

For a time the system worked; while the novelty of it lasted, the barons appeared fairly regularly at the Council table and busied themselves with the daily work of government. But it could not last very long. To lords who were used to power and longed for more, the tiresome routine of a government office was irksome, and as the fifteenth century proceeds we note the increasing difficulty of assembling any number of lords. With their defection the machinery of government was bound either to collapse completely or else to fall into the hands of a group of minor officials. Finally a way was found whereby the regular business of administration was left to professional clerks and household officials, while the lords trusted to their influence in Parliament and the Great Council to be able to supervise the general progress of events. But even this proved too much for the barons. Sooner or later it was unavoidable that they should be divided into the two camps of Lancaster and York, and the Wars of the Roses were an inevitable result; and so the mediaeval baronage finally destroyed itself.

To the historians and political antiquaries of the seventeenth century the records of the Lancastrian period were a rich mine of precedents for parliamentary procedure, and their interpretation of the history of the fifteenth century was decisive during the period of the Great Rebellion. To the leaders of the opposition to Charles I the Parliaments of Henry IV and his successors seemed just the same in composition, in powers, and in constitutional spirit as the Parliaments of their own day. Just as the "myth" of the Great Charter is more significant than the Charter itself, so the seventeenth-century interpretation of Lancastrian history has had more practical effect than the actual events would warrant.[2] But to an historian who would examine the constitution under the Lancastrian kings and free his mind from the theories which were current in the reigns of James I and Charles I the picture seems rather different. The institutions were there

1 Plucknett, *The Place of the Council in the Fifteenth Century* (Transactions of the Royal Historical Society, 1918), 163.

2 See, for example, J. E. Neale, *Free Speech in Parliament* (Tudor Studies presented to A. F. Pollard), 257–286.

and we can read about them in language which looks strangely modern, but nevertheless, the spirit within them is still feudal. It was characteristic of the middle ages that the law of land and the property ideas connected with it should take the place and serve the purpose of what is now called constitutional or public law. It is perfectly clear that this was still the case under the Lancastrians. When great public questions arose, as happened more than once, they were discussed in terms of feudal property. It was not until we reach the reign of Edward IV that we find the first examples of reasoning which are truly and essentially modern upon such questions.[1] The same thing is true of local conditions. The barons who hoped to establish their domination over the Crown were carrying out the same policy in the sphere of local politics. Large masses of evidence bear witness to the extent to which local government was demoralized through the influence of the great landowners. Trial by jury collapsed utterly; parliamentary elections either represented the will of the local magnate or took the form of small battles; the administration of law both at Westminster and in the country was seriously hampered by the breakdown of local machinery and widespread corruption. The lawyers did all they could under the circumstances. They elaborated the law patiently and skillfully. A succession of judges of marked ability were making decisions of great importance, but it was on the administrative side that the common law became ineffectual.

By the time the Wars of the Roses were over the baronial ranks on both sides had been seriously depleted. In fact the baronage, as a political class, had destroyed itself and there remained only the Crown, weakened indeed, but still ready at a suitable moment to resume the great tradition of re-establishing orderly government. With the exile of Henry VI (1461) and the accession of the Yorkist, Edward IV, the work of reconstruction begins. New instruments and new methods begin to appear. The Court of Chancery becomes much more prominent and fills gaps where the common law had been too timid or too weak to attempt reform. The Court of Star Chamber was at this time nothing more nor less than the Council, and it struggled manfully to enforce order

[1] The cases upon which these conclusions are based will be found discussed in Plucknett, *The Lancastrian Constitution* (Tudor Studies presented to A. F. Pollard), 161–181.

in cases where the normal criminal law was hopelessly inadequate. In all this the mainspring was necessarily the Crown, and so we find that the nation turned to the monarchy with a sigh of relief after sixty years of baronial anarchy. This brings us to what has been called the "new monarchy," which will eventually culminate in the popular nationalist dictatorship of the great Tudor monarchs, especially Henry VIII and Elizabeth.

CHAPTER VI

THE TUDORS: RENAISSANCE, REFORMATION AND RECEPTION

The house of Tudor came to the throne with the accession of Henry VII after the Battle of Bosworth in 1485, and ruled England during one of its most brilliant periods, the sixteenth century, until the death of Queen Elizabeth in 1603. It was the golden age of literature, beginning with Sir Thomas More and ending with Bacon and Shakespeare; an age, too, of heroic adventure when the seamen ranged the ocean in search of new continents, and planted distant colonies whose future they could never have guessed. But besides the distant new worlds which adventurers had discovered, there was something like a new world in old Europe too. A wave of new ideas was remaking the intellectual life of Italy and France, Germany and England, and these ideas are usually grouped together by historians under the three headings of the Renaissance, the Reformation and the Reception. The movement begins with the revival of classical studies, and especially of Greek. Sometimes this resulted in a sort of new paganism; instead of the frigid logic of Aristotle which had dominated the middle ages, attention turned to the genial romance of Plato, and to the poets. More occasionally the movement took a distinctly religious form, and the tragic lives of Pico, Politian and Savonarola illustrate the beauty of Christianity lived in the light of classical humanism. In England the movement is represented best by Sir Thomas More, Chancellor, historian and romantic philosopher, who combined a platonic fancy for Utopias with a steadfast devotion to traditional Catholicism which cost him his life in 1534. Erasmus also was influential in England where he lived for some time as Professor of Greek at Cambridge. As with every great intellectual movement, the Renaissance had profound effects upon the conception of law.

The mediæval man has never succeeded in ridding himself of his reputation for lawless behavior. It is possible, no doubt, to

overestimate the amount of disorder that existed, but nevertheless the fact remains that violence is a conspicuous element in almost any mediæval chronicle. Born amid the ruins of the Roman peace, the early days of the middle ages witnessed the successive failures of several attempts to restore some semblance of authority; and this confusion was further confounded by persistent invasions. Feudalism was the compromise finally reached, and although it made wide concessions to the military idea, nevertheless in the end it accomplished the difficult task of subjecting armed force to the rule of law. Naturally progress was quicker in some places than in others, but everywhere at least a lip service was paid to the idea of law, and as the middle ages proceed it becomes more and more evident that law was winning. Religion had an important rôle in this development and contributed the valuable conception of Jehovah as a law-giver and law-enforcer—a conception derived from Judaism. Out of all the confusion and disaster of the middle ages there arose the unanimous cry for law, which should be divine in its origin, supreme in its authority, rendering justly to every man his due. Of the many intellectual systems devised in the middle ages, there was one which proved to be a practical as well as an intellectual answer to some of the most urgent of life's problems, and that was law, law which was directly based upon the divine attribute of justice.

It might have been that the idea of law was no more than a despairing refuge in an impossible Utopia, devised by minds frightened by the evils around them. But Utopias belong to modern history; the mediæval man was above all a man of action, and out of the night of the dark ages he began to build the fabric of law. Surely the rule of law is not only a worthy achievement of the spirit, but also a great active crusade, and the greatest of all the crusades, because it alone survived its defeats.

Such is the subject matter of legal history in the middle ages where we can follow the rise and progress of law and the rule of law. When we come to Machiavelli we reach the spirit of the Renaissance, and begin to find law itself questioned, for his distinction between public and private morality is essentially the same heresy as to divide the substance of the Godhead; a double standard introduces a sort of polytheism utterly repugnant to mediæval thought. And true enough, there soon came the State,

as a sort of anti-Christ, to wage war with the idea of law. The issue of this conflict is perhaps still uncertain, but mediæval thought is to-day fighting hard for the cause of law against the amoral, irresponsible State. It was mediævalists in England, armed with Bracton and the *Year Books,* who ended Stuart statecraft, and the Constitution of the United States was written by men who had *Magna Carta* and Coke upon Littleton before their eyes. Could anything be more mediæval that the idea of due process, or the insertion in an instrument of government of a contract clause? *Pacta sunt servanda,*[1] it seems to say, with the real mediæval accent. It was Machiavelli himself who gave us the word "state" and filled it with the content which we now associate with it.[2] Instead of the mediæval dominion based upon divine right and subject to law, we have the modern State based upon force and independent of morality. And so, where many a mediæval thinker would ultimately identify law with the will of God, in modern times it will be regarded as the will of the State.

The second aspect of this intellectual revival is the Reformation. The study of Greek led scholars to examine the New Testament in the original tongue, and soon they began to interpret it in the light of private judgment instead of following traditional custom. This abandonment of custom is highly significant of the change from mediæval to modern times. The attempt to reconstruct Christianity from the New Testament and the earliest fathers meant a denial of over a thousand years' growth and development in Christianity, based upon custom. This denial of the validity of theological development operating through custom and slowly shifting tradition had its parallel in legal history. Custom tends to be depreciated more and more by the State, until finally the legal restrictions within which it is confined eliminate it as one of the major sources of law. In other words, the State and the central organs of government, the courts and the legislature, are becoming the sole source of law.

The quarrel of Henry VIII with the papacy was for a time purely mediæval in its character. Many a king and noble had been involved in similar matrimonial tangles and had incurred the displeasure of the Holy See. There was even mediæval

[1] "Pacts should be kept" (motto of Edward I).

[2] For references to the history of the word, see Plucknett, *Words,* 14 Cornell Law Quarterly, 263–273.

precedent for the confiscation of monastic property, but the modern spirit appears when the quarrel is carried a step further, and the doctrinal basis of Catholicism is questioned. With the reign of Edward VI the Reformation is definitely accepted as a political weapon against Rome, and (after a short reaction under Mary) the early years of Elizabeth made it the permanent basis of English political and religious life.

This attack upon the foundation of the Church was bound to undermine the mediæval State as well. Church and State had frequently quarrelled during the middle ages, but it was the very intimacy which existed between them that provoked dissension. They were not two different powers, but merely two aspects of the one divine mission of ruling the souls and bodies of men by law. Law in the theological sense, and law as the lawyer knew it, were both based upon the same foundation—the will of God as expressed through authority (whether ecclesiastical or royal), tradition and custom. To attack the authority of the Church was therefore to attack the whole mediæval system of law. Just as the Reformers went behind traditional Christianity to the historical sources, so there was a movement to go behind traditional law and seek for its origins. A striking example of this is the growth of two schools of Roman law, the first of which was content with Roman law as it was modified by mediæval custom, while the second insisted upon a return to the strict letter of the classical texts.

The attack upon the traditional basis of mediæval Christianity had its counterpart in political theory. It soon became evident that as a result of the Reformation, religion was no longer to be universally admitted as the basis of civil government. The foundations of religion had been shaken, and were differently interpreted in different countries and by different thinkers. As substitutes, various theories were proposed. In a number of them "the people" were brought into the reckoning, and attempts were made to base the theory of government upon the idea that kings existed for the convenience of their subjects, instead (as in the middle ages) both king and people working together for the glory of God. An early form of this idea is to be found in the controversies during the sixteenth century upon the question (at that time very topical) whether a bad king could be properly assas-

sinated by his outraged subjects. Later still it will be proposed that kings, that is to say the State, and all the forces of government, including law, are based upon a contractual relationship between ruler and subject. Some were prepared to assert this as an historical fact; to others it was to be merely presumed from existing circumstances.

This secularization of law had its effects upon the constitution. In England, as in several other states, government fell into the hands of the professional administrator, and "reasons of State" will place in his hands an extremely wide, over-riding discretion. In England this takes the form of the dominance of the Council under all the Tudor sovereigns, and in the rise to importance of the office of Secretary of State. As long as Queen Elizabeth lived she was able to maintain the supremacy of the administration above the old feudal legalism, which was timidly asserted from time to time by the common lawyers. In general terms the conflict between the Council and the courts, between administration and law, is the theme of sixteenth and also of seventeenth century history, and its origins are clearly to be traced back to the Reformation and the resulting disorganization of mediæval political thought. During all this period the typical common lawyer was on the conservative side. He still pored over mediæval books, he practised in mediæval courts, and was often suspected of being secretly an adherent of the old religion. There was, therefore, a tendency to look outside of the legal profession for men to fill administrative posts, and it was to the civilians that Henry VIII turned when he was founding or re-organizing such administrative courts as the Privy Council, the Star Chamber, the Court of Requests, the Court of High Commission, the Council of the North, the Council of Wales, and the rest.

Attendant upon the Reformation came the Church settlement. It is a striking feature of Henry VIII's reign that he was able to use Parliament itself as a convenient machinery for effecting the complicated settlement. The results were momentous. Parliament thereby acquired the experience of carrying out measures which were in fact revolutionary. In one statute it declared that the supreme head of the Church was not the Pope, but Henry; in another it confiscated enormous quantities of property which had been held by the Church for centuries undisputed; in another even

so sacred a thing as Christian doctrine was re-stated by statute, first in ten, then in six articles; soon it was to establish a prayer-book to replace the age-old formularies hitherto in use. When in later years the powers of the modern State are to be analyzed, Parliament will hold a very large place in the scheme of things. Those who maintain the omnipotence of Parliament will find their most striking illustrations in the acts which carried out the Reformation in England. Henry VIII has been well described as the "great architect of Parliament." [1]

And, finally, we come to the movement known as the Reception.[2] This was a widespread tendency in various countries of Europe to receive the classical Roman law in place of the mediaeval customary law which had only been partially Romanized. The legal scholars of the day had taken anew to the study of the books of Justinian, ignoring the thousand years of history which had introduced serious modifications in adapting Roman law to current conditions. The same problem arose in England. Traditional Christianity as represented by the mediaeval Catholic Church was replaced by a system which to its adherents seemed simpler, more reasonable and more in accord with ancient history. Ought not a similar reform to be carried out in the sphere of law? Ought not the mediaeval common law which was inexpressible in any decent language, French, Latin or English, to be replaced by the pure and ancient doctrine of the Digest? This question was seriously considered. Reginald Pole, cardinal and last of the Yorkist line, who stood equally good chances of becoming King of England or Pope, had committed himself to the idea. Henry VIII was well aware of the merits of the civilians, and founded the still-existing Regius Professorships at Oxford and Cambridge for the propagation of their learning. As administrators and as judges in the prerogative courts their influence was paramount. They also maintained an ancient feud with the canonists and the papacy. But against the courts of common law they stood little chance of success. The close organization of the profession and the numerous vested interests which it contained, the strong tradition of its educational system centering in the Inns of Court,

[1] Pollard, *Evolution of Parliament* (2nd ed.), 126.

[2] As to this see Maitland's famous lecture *English Law and the Renaissance* (printed in 1 Select Essays in Anglo-American Legal History, 168–208), and the remarks below, p. 214.

and the practical impossibility of superseding the courts by a newer system, had the result of entrenching the common lawyers within the tangles of their feudal learning; which moreover had become the basis of every family fortune in the land. We venture to suggest that once again the common law stood impregnable upon the foundations laid by Henry II. It was he who gave the common law its firm grip upon the land, and for the future the more elaborate the land law became and the more subtly it contrived to entangle both present and future generations in the maze of real-property law, the more impossible it became for the landed classes to contemplate any interference with the system which assured to them and their children the complicated benefits of inheritance. In Germany, France and Scotland the Reception was accomplished, but not in England. Nevertheless the common law for a time had to maintain a stubborn defense, and for the first time in its history it made a definite alliance with the members of the House of Commons who were equally willing to accept the aid of the lawyers. In this way were laid the foundations of the coalition between the House of Commons and the common law which was to dominate English history during the seventeenth century.

The Tudor period had its own problem. The transition from serfdom to copyhold was nearly complete, but nevertheless there was considerable economic distress, and from the later years of Queen Elizabeth proceeds a stream of legislation dealing with unemployment and the relief of paupers, while the mediæval machinery for the fixing of wages was kept in steady operation and even enlarged.

Then, too, we find English writers for the first time taking an interest in such topics as international law and in the international aspects of commercial and maritime law, of which we shall speak later.

Finally some words must be said on the extremely important legislation of the Tudor sovereigns. The reign of Henry VIII saw an outburst of legislation which is almost comparable to that of Edward I. The great statutes which carried out the Reformation have already been mentioned, and their importance exceeds even their position as the foundation of the Church of England, for they were astonishing examples of the almost limitless powers

assumed by Parliament. Besides this, a good deal of legislation was concerned with treason, illustrating the growth of the idea of the State and the inadequacy of merely mediaeval law for its protection against the new dangers which its own activities had aroused.[1] Of the rest of Henry VIII's legislation we must mention the Statute of Proclamations (1539). Although soon repealed it is nevertheless highly significant. The old view that this statute constituted a sort of *Lex Regia* conferring upon the Crown the power of wide legislation without the concurrence of Parliament has been abandoned.[2] The growing complication of government had brought the proclamation into prominence for the first time as a useful means of supplementing statute law on points of detail, and of carrying out those processes which to-day are effected by administrative bodies with powers delegated from the legislature. The latest opinion is that "the existing law was obscure and the inconvenience of this obscurity was not likely to be overlooked by a King who was remarkable for his political prescience. Henry VIII's Statute of Proclamations was an extremely able attempt by King and Parliament to deal finally with the problem in a manner which should commend itself to the public opinion of the day."[3] The statute provided that in cases of emergency the King and Council may issue proclamations which shall have the force of an act of Parliament. They were to be published in a manner prescribed by the act, and offenders against them were to be tried by a board of councillors named in the act, constituting, as it seems, a special tribunal for the enforcement of proclamations. This device is certainly in accord with Henry VIII's general policy of erecting special courts for special business, instead of enlarging the jurisdiction of the old common law courts. The second section of the statute contains carefully drawn safeguards to prevent proclamations being used in an oppressive manner; the principles of the common law, existing acts of Parliament, and property rights were put beyond the reach of proclamations. Moreover, it is equally clear that the use made of these powers by Henry VIII and his Council was moderate and reasonable;

1 See the admirable study by Andrew Amos, *The Statutes of the Reformation Parliament.*

2 See Tanner, *Tudor Constitutional Documents*, 530.

3 4 Holdsworth, *History of English Law*, 102. (For the future this work will be cited as "Holdsworth." References are to the third edition.)

there is no evidence that the King hoped by means of proclamations to establish an absolutism or to supersede the legitimate activities of Parliament. The two other great statutes of this reign, the Statute of Uses and the Statute of Wills, must be considered more at length in discussing the history of real property. Here it will be sufficient to mention them and to premise that their policy was dictated by deep political causes and required a good deal of bargaining between the Crown and different classes of society. At the basis of them lies the grave movement of agrarian unrest which was to produce several insurrections under Henry VIII and Edward VI.

With the reign of Queen Elizabeth (1558–1603), and especially the second half of it, we come to a sort of uneasy peace. The Reformation is an accomplished fact; the various attacks upon the position of the Crown, whether from domestic pretenders or from foreign foes, had definitely failed; the deposition of Queen Elizabeth by papal bull and the attempt to execute it by foreign invasion had likewise failed; the defeat of the Spanish Armada (1588) had given to England security upon the sea, and henceforward there was to be no serious question of foreign interference with her domestic politics—at least openly. In the sphere of law there is a similar feeling of problems having been settled or at least shelved; the common law courts begin to revive; the momentous legislation of Henry VIII is being absorbed; a new generation of lawyers brings fresh life to the old system, and a sincere attempt is made to stretch the common law to the measure of the growing needs of the community. Parliament, and especially the House of Commons, was settling its sphere of activity within the enlarged boundaries which Henry VIII's reign had allotted to it. The House of Commons was growing steadily more important; it attracted men of great ability and was establishing close contact with the administrative side of the government. It is during this period that officials, state secretaries, and members of the Privy Council begin to appear explaining and defending their policy before the Commons and acting as a *liaison* between the government and the governed. Although the Tudor age on the surface seems to end upon a quiet note, nevertheless there are indications that a loyal and devoted respect for the great Queen had a great deal to do in preventing the Commons from insisting too pointedly

upon matters where they differed from the Crown. The extraordinary knowledge of human nature which Queen Elizabeth possessed, together with her admitted ability and prestige, had enabled her to prevent the raising of difficult questions; upon the first signs of trouble a motherly scolding was always effective in reducing the House of Commons to respectful silence and even apologies. In the meantime the House developed a considerable degree of control over its own procedure, and discipline over its members. This achievement of "parliamentary privilege" helped a great deal in establishing a spirit of united self-consciousness in the House, and the precedents themselves stood in good stead in the succeeding troubles with the Stuarts. In short, the quiet closing days of Queen Elizabeth's reign were in fact a period of armed peace during which both Crown and Parliament were silently strengthening themselves for a conflict which both of them seemed to apprehend. It must never be forgotten that the Tudor monarchs were wise enough and strong enough to use Parliament as an implement of their policy, but that the success of this method depended upon the monarch commanding the personal devotion of the Commons, both by reason of a policy which was fundamentally popular, and of the certainty that the Crown really did stand for the good of the realm. When the Commons begin to doubt whether the King is more concerned for his own or the nation's interest, then this working alliance between Crown and Parliament will cease. There is no longer any question of a feudal nobility stepping into the breach; if the Crown cannot govern to the satisfaction of the nation, then the House of Commons will be compelled to undertake the government itself. This brings us to the Stuart age.

CHAPTER VII

THE STUARTS: STRUGGLE FOR THE SUPREMACY OF LAW

A vast flood of new light has been thrown in recent years upon the history of the seventeenth century. Large masses of new documents are now available, but it is only recently that they have been sufficiently absorbed to enable us to draw with confidence an accurate picture of the age.[1] So many different aspects of life have to be considered. It was an age when conscious and deliberate political theory definitely enters the arena. At the same time there are undoubtedly important economic factors which played a large part in the conflict. Religion also added endless complications to an already baffling situation. Elizabeth held the reins of Church and State, but the Church itself had been based upon a denial of tradition and authority; the Church consequently had no answer to fresh denials, save to shelter herself behind the throne. To an extraordinary extent public thought was turning to various forms of sectarianism, and speculation very frequently took the form of theological controversy. The theory of the State was less developed. The age of the Tudors and of the Reformation had for the moment carried the State far ahead of political theory, and the pressing business of administration had overshadowed the more sober business of law. The great names in the age of Elizabeth are not those of lawyers or of judges, but of councillors and secretaries. Against the administrative state there was bound to be a reaction, especially when the nation began to doubt the wisdom of the policies pursued. The spirt of theological questioning was to be extended to the State, and the uncertainty of the foundations of religion, and the breakdown of the old theories of authority in the Church, will have their inevitable effect of bewildering those who sought for the foundations of the State as well. In the end, attempts were made to use the few

[1] The 4th, 5th, and 6th volumes of Holdsworth's *History* supersede previous histories of the Tudor and Stuart periods.

remnants of mediæval thinking. The Crown naturally turned to the doctrine of the divine right of Kings, but interpreted it in a narrow sense which a mediæval philosopher would hardly have recognized. In this way the old doctrine of the divine origin of civil government became restricted to a particular form of government, that is to say, a monarchy, and to a particular section of that form, the King himself. In opposition to all this, the revival of the common law brought back a view which more nearly represented the mediæval attitude. This view was drawn to a large extent from the pages of the greatest of mediæval lawyers, Bracton, whose stupendous work on the laws of England was first printed in 1569 and again in 1640. In this book Sir Edward Coke and other common lawyers found the simple mediæval doctrine of the supremacy of law. In a personal altercation between James I and the great Chief Justice the issue was clearly expressed: James, by his prerogative, claimed to be above the law by divine right, and to this Coke replied by quoting the memorable words of Bracton: "The King is subject not to men, but to God and the law." In other words, Coke was prepared to revive the age-old dogma that law, divine in its origin and sanction, is the basis upon which civil society is built, and that this law is supreme above King and people equally. The theory of the divine right of Kings, on the other hand, ascribed this religious character to one branch only of the machinery of government, the King. Soon it became evident that there was danger of the latter doctrine combining with the newer notions of the State (resembling somewhat the theories of irresponsibility which a later age was to produce), to create thereby a sort of "Leviathan"—to use the later term of Hobbes. Regarded in this light, the conflict of theory between Crown and Parliament is one between the mediæval view of a paramount divine law, supreme over every aspect of government, and an attempt to transfer this divine sanction to a monarch who is also to embody the State in the more modern aspect of the word. From this point of view, Parliament represents the conservative side and the Crown the side of innovation. From another angle, however, the positions might appear to be reversed. When it came to the details of the actual powers which the Crown had exercised in the past independently of parliamentary control, it was a plausible argument for the Crown to insist that it was, in

fact, basing its position upon mediæval precedent. This was particularly true on various matters of indirect taxation which the middle ages had left in a very obscure condition. In asserting control over these matters, the House of Commons laid itself open to historical arguments of considerable force, which would have been stronger still if the Crown had been able to secure the services of antiquaries as learned and zealous as those of the parliamentary party. Even so, when it came to the judicial interpretation of mediæval precedents, the courts more than once had to find for the Crown—and we are at perfect liberty to assert that the judges who made these decisions reached them honestly and properly upon the historical evidence available to them, although they often spoilt the effect by gratuitously introducing a good deal of dogma on divine right. The historians of a later age, imbued with partisan spirit, have certainly been too free in their wholesale accusations of subserviency against the Stuart judges. From this point of view, therefore, it is the Crown which seems conservative and Parliament the innovator. However, the Commons were fortunate in possessing several antiquaries of truly prodigious learning; William Prynne, for example, had read enormous quantities of mediæval rolls. Sources which are voluminous even in modern reprints and abstracts, Prynne could quote at great length from the original manuscripts, which he had studied by candlelight in the dank vaults of the Tower. Only those who have had to spend many hours with mediæval records can appreciate the immensity of his labors. As we have already mentioned, the ambiguous rolls of the fifteenth-century Parliaments were a particularly rich mine for the opposition, being easily susceptible of interpretations in their favor.

From what has just been said it will be clear that the frank acceptance of the principle that current problems were to be settled upon the basis of antiquarian research might work both ways, and in fact the very honesty with which it was followed, has had the effect of making some judges give inconsistent decisions. At times, Sir Edward Coke seems to be a champion of prerogative, although at other times he is one of the most intrepid of parliamentarians. He must not be blamed too much for these inconsistencies[1] which were really implicit in the whole of the parlia-

[1] For further remarks on this topic, see below, pp. 162–164.

mentarian argument. He himself seems aware of this weakness, and to remedy it he fell back with great ingenuity upon a position which he skilfully developed, and which has had immense influence, especially in this country:

"Urged by a presentiment of the coming conflict of Crown and Parliament, he felt the necessity of curbing the rising arrogance of both, and looked back upon his country's legal history to find the means. This instinctive appeal to history for guidance was characteristic, and the choice of a legal rather than any other solution was amply justified by the remarkable continuity and stability of English law during the vicissitudes of the seventeenth century. His attitude is aptly expressed in one of his own picturesque phrases. 'Let us now peruse our ancient authors,' he wrote, 'for out of the old fields must come the new corne.' So it was in this spirit that he labored at the ancient patrimony of his profession, those short, thick folios of black-letter *Year Books*, and from their forbidding mass of obsolescent technicalities raised a harvest of political theory which was destined to be the food of far-distant states to which he had never given a thought.

"The solution which Coke found was in the idea of a fundamental law which limited Crown and Parliament indifferently. What that law was, its nature and its contents, were questions as difficult as they were insistent—and, as subsequent events showed, capable of surprising solutions. The nearest we find to an explicit definition of this fundamental law is the assertion of the paramount law of 'reason.' For the rest, the common lawyer's 'reason' is left in as much uncertainty as he himself ascribed to the Chancellor's equity. Moreover, Coke was prepared to advance mediæval precedent for his theory, and in so doing has drawn upon his head the criticisms of later investigators. Just as these criticisms are, from the point of view of modern scholarship, it is only fair to the Chief Justice to insist that his view of history was not ours, and that it is only by the standard of his own day that a true evaluation of his learning and intellectual honesty can be formed. Although it must be confessed that even then he cannot be found altogether faultless, yet it is believed that a sufficient explanation will be found to establish his *bona fides*. His doctrine is certainly based largely upon mediæval precedents and the extent to which they justify it is an interesting subject for investigation. But if we reach a different estimate from his of the *Year Book* authority for his dogma, this must not be taken as necessarily involving a severe censure of Coke. He himself has told us that though the fields are old, the corn is new." [1]

This doctrine was first proclaimed by Sir Edward Coke in his

[1] Plucknett, *Bonham's Case and Judicial Review*, 40 Harvard Law Review, 30. It has recently been suggested that Coke abandoned the idea later on; Boudin, *Lord Coke and the American Doctrine of Judicial Power*, 6 New York University Law Review, 233–246.

judgment in *Dr. Bonham's Case* (1610),[1] and for nearly a century afterwards the idea that the common law could be regarded as a fundamental law seemed attractive to certain minds. The Crown viewed the new theory with alarm, and Coke was ordered by the government to explain his doctrine and to "correct" his reports.

A solution so simple as this frank return to the mediæval idea of law could hardly have a chance amid the riot of party passion which was soon aroused. In this place we shall be content with only a very brief summary of the stirring events which occupy the reigns of James I and Charles I. Fuller details are to be found in the great work of Hallam,[1a] and the more recent text books based upon it, while a valuable collection of documents has been made by Sir George Prothero.[1b] Hallam and all his followers, however, must be read subject to the superior authority of Professor Holdsworth who has given us the first extended history of the legal questions involved.[2] In the first place we have a long series of precedents on the subject of parliamentary privilege such as *Shirley's Case* (1604),[3] and *Darnel's* or the *Five Knights' Case* (1627).[4] The powers of Parliament were further asserted in impeaching unpopular ministers. Worse still the procedure by bill of attainder was revived. Then again a long constitutional conflict arose over matters of taxation. The obscurities of this subject during the middle ages had never been thoroughly cleared up, and there was a good deal of justifiable doubt as to the powers of the Crown in this respect. *Bates's Case* or the *Case of Impositions* (1606)[5] decided that the Crown without the concurrence of Parliament could increase the rate of customs duties. A variety of other expedients were devised for raising money, such as the revival of the forest dues and the demand for ship-money. This latter was contested in *Hampden's Case* (1637)[6] which also was decided in favor of the Crown. It is noteworthy that previous to

[1] 8 Rep. 114.

[1a] Hallam, *Constitutional History of England*, (1827). There are numerous later editions, one of them in the handy "Everyman Library."

[1b] Prothero, *Select Statutes and Other Constitutional Documents Illustrative of the Reigns of Elizabeth and James I*, (1898) and later editions.

[2] 6 Holdsworth, 1–302.

[3] Fully discussed by Prothero in 8 English Historical Review, 735–740.

[4] 3 S. T. 1.

[5] 2 S. T. 371.

[6] 3 S. T. 825.

the trial the King called upon the judges to give him an extra-judicial opinion upon the questions at issue. Their answers were in favor of the Crown and were ordered to be read publicly in the Star Chamber and enrolled in all the courts of Westminster. In the midst of this conflict Sir Edward Coke was compelled to take a side, and finally became one of the leaders of the parliamentary party. The crisis came in 1616 when the *Case of Commendams*[1] raised some technical points of ecclesiastical law and the validity of a royal grant *in commendam*. Coke's dissenting opinion in this case immediately brought about his dismissal from office. Events steadily moved to a climax. The House of Commons defended its privileges fiercely and claimed complete freedom from royal interference for its debates and its members. At the same time the House was assuming control over every source of revenue and was deliberately using the power of the purse to compel the Crown to choose or dismiss ministers, and to pursue policies at the dictates of the Commons. It is this claim which makes the history of the seventeenth century so totally different from that of preceding ages, save, perhaps, the superficial resemblances in some respects which are to be found in the fifteenth century, while the Lancastrian monarchy was extraordinarily weak. Finally, the Commons embodied their demands in the Petition of Right (1628) which contained a long list of grievances. Rehearsing a number of statutes and several provisions of the Great Charter, the Commons declared that arbitrary imprisonment is unlawful and that a Privy Council warrant setting forth the King's special command shall be no sufficient return to a writ of *habeas corpus*. The unreasonable billeting of soldiers and the trial of civilians by martial law were likewise denounced.

From 1629 to 1640, Charles I contrived to rule without calling a Parliament. Grievances were steadily accumulating. The Church of England (unwisely led by Archbishop Laud) was suffering more and more from the spread of dissent, and it was inevitable that the Church and the Crown should make common cause against those who combined a dislike for the establishment with anti-royalist principles. The laws already existing against non-conformists were enforced with great harshness by those courts which were most amenable to royal influence—the Star

1 Reported as *Colt and Glover* v. *Bishop of Coventry*, Hobart, 140.

Chamber and the Court of High Commission. Consequently, the conflict was still more embittered by the introduction of a religious feud. Finally the Church question was to be the ruin of Charles. He rashly undertook to impose Anglicanism in Scotland upon a people whose religious fanaticism even exceeded his own. A war was the immediate result and then came inevitably the summoning, first of the short Parliament (1640), and then of the long Parliament (1640–1660). By this time, Parliament was master of the situation. The Earl of Strafford and Archbishop Laud were attainted and put to death. Ship-money was abolished; so also were the Courts of Star Chamber and High Commission, and steps were taken to prevent a dissolution without Parliament's own consent. The Church and the universities were both attacked, and Charles replied by impeaching before the House of Lords five members of the Commons, a proceeding which the Commons claimed was their sole privilege. The House vigorously defended its members, and when the King in person came to order their arrest, the word "privilege" was uttered loud enough for him to hear. From this date (1642) the Civil War became inevitable. All sense of moderation was lost and in 1649 a revolutionary tribunal condemned and executed the King. From 1649 to 1660 various forms of government were devised which in this country particularly are of great interest. Most important of all was the Instrument of Government, a document which purported to be a fundamental constitution which was to be unchangeable save by particularly complicated machinery. This document, therefore, may be properly regarded as a prototype of the written fundamental constitution, as it is known to American public law.[1]

Although Sir Edward Coke had found it impossible to avoid taking a violent part in national politics, his successor, Chief Justice Hobart succeeded in winning the confidence both of the royalists and the parliamentarians. However, the courts were well served during the period of the Commonwealth; Henry Rolle became Chief Justice of the "Upper Bench," while Sir Matthew Hale sat in the Court of Common Pleas during the Commonwealth and won royal favor after the Restoration. It is interesting to note that a good many anticipations of modern legal reforms were proposed during this period although it is hardly necessary to

[1] See Jenks, *Constitutional Experiments of the Commonwealth*, (1890).

say that most of these premature advances ceased at the Restoration. Among them we may mention the settlement of the jurisdiction of the various courts in order to prevent the scandalous competition between them. Chancery, which had been bitterly attacked by Sir Edward Coke, undertook to reform itself; ecclesiastical jurisdiction was, of course, abolished. The growth of over-seas commerce provoked the re-organization of the admiralty courts, while district courts for small claims were proposed. Legal education was revived in the Inns of Court and legal records were henceforward to be in English. A good deal of thought was given to a projected codification of the law, and a system of registering titles to land was likewise proposed. As early as 1648 an essayist suggested that there should be only two legal estates, fee simple and for life, abolishing the entail entirely. The eleven short years of Republican rule were too much filled with war and high politics and religious dissension for these proposals to reach any very practical result, for the restoration of Charles II. in 1660, automatically restored the state of affairs as it existed at the time of his father's death.[1]

The movement had its results, however, for Charles II's reign was in fact a period of legal reform. At the very commencement tenure in chivalry was abolished. This abolition of a great deal of mediæval law relating to such subjects as wardship, marriage and feudal tenure was counterbalanced, however, by an increase in complexity in other departments of the law of real property. There may be a certain amount of truth in the suggestion that has several times been made, that periods of civil disturbance have been frequently accompanied by the development of new devices by the conveyancers with a view to tying up property in land so as to put it, as far as possible, beyond the reach of such political accidents as forfeiture and improvident management. Thus the fifteenth-century landowners seem to have resorted to the use of a protection—which the legislature soon defeated, however—against the frequent forfeitures of legal estates attendant upon the Wars of the Roses. So in the seventeenth century the widespread confiscations of royalists' properties during the period of the Common-

1 See Robinson, *Anticipations under the Commonwealth of Changes in the Law* (1 Select Essays in Anglo-American Legal History, 467–491). For the Commonwealth practice of giving new trials when verdicts were unsatisfactory (an innovation at that date) see below, p. 114.

wealth was accompanied by numerous developments in the art of conveyancing which from this date onward reached an astonishing degree of technicality. Another great legal reform effected in the reign of Charles II was the enactment of the Statute of Frauds (1677). This statute has been so constantly before the courts from that day to this, and has been adopted in so many jurisdictions, that a few words must be said as to its origin and policy. There exist a number of drafts and projects of legislation which illustrate quite clearly the problem involved.[1] A detailed examination of these drafts confirms the claim of Lord Nottingham to the principal share in its authorship, although a number of additions and improvements came from other hands. Like every piece of legislation it must be judged from the standpoint of the place it held in the legal system as it then existed. If, in the course of the centuries conditions have so changed that a piece of old legislation no longer conduces to justice, then the blame for the situation must obviously lie not upon the original authors of the statute but upon the profession of to-day. The lawyers of the seventeenth century had the courage to meet a serious situation by deliberate legislation, and we can do no less. If the statute has proved in some respects unsatisfactory under modern conditions, then the remedy lies in our own hands. We shall therefore examine for a moment the position which the statute occupied in the environment wherein its makers placed it. To begin with, it must be remembered that jury trial in 1677 was still essentially mediæval.[2] The modern device of ordering a new trial when the verdict is clearly against the weight of the evidence was in its infancy. Again, at this date the law had barely begun to acquire experience in the handling of parole evidence: such rules as did exist were ancient and obstructive, for parties to the action, their husbands, and wives, and all other persons interested in the outcome of the litigation were incompetent as witnesses. It is obvious, therefore, that the law was faced with two alternatives in 1677: either the whole law of evidence as it then existed would have to be scrapped and re-placed by a hastily improvised system upon modern lines, or else parties who desired legal protection for their transactions must be compelled to take the precaution of

[1] They are fully discussed in 6 Holdsworth, 379–397.

[2] This can be seen from *Bushel's Case* (1670) below, p. 114, and Pound and Plucknett, *Readings*, 164–167.

embodying them in properly executed documents whose contents and authenticity were easily ascertained. The first alternative in point of fact hardly existed; it has taken two centuries of hard experience to develop the law of evidence thus far, and a great deal still remains to be done. It was only reasonable, therefore, that the profession, guided by Lord Nottingham, should have adopted the second policy; and from what has just been said it will surely be clear that under the circumstances they followed the only practicable path. As far as these provisions refer to transactions concerning land there has been less serious cause for complaint. It is in matters of trade and commerce where business habits have always been to a large extent informal, that the principal difficulties have arisen. But there is surely some force in the argument that there should be, in common prudence, some impersonal evidence available when serious matters are at stake. "To be fair to its framers, we should, I think, remember three things," writes Professor Holdsworth. "Firstly, the law of contract was as yet young; it had been developed wholly by decided cases; and it had very few rules as to the characteristics and incidents of particular contracts. It follows that the framers of the statute were legislating on a branch of the law which was not fully developed, and on a topic which had not before been a subject of legislation." If a legal system is to depend upon legislation to any extent at all for its readjustment to the newer needs, then the principle of legislation must be frankly admitted in its entirety, and the profession must be prepared to undertake a constant and sustained task of legislating again and again in order to enable the law to keep pace with the march of events. It is clearly illogical to impose legislation at long intervals, restricting the courts to the comparatively humble work of interpreting the letter, and then, when confusion results, to blame the legislature of two hundred years ago.

The period from 1660 to the Revolution of 1689 is, however, more remarkable for its contributions to public, rather than to private, law. The one other great legal reform of the reign of Charles II was the passing of the *Habeas Corpus* Act in 1679. The writ of *habeas corpus* has played such a large part in the struggle for liberty that a short history of it must be given here.[1]

[1] The details are given in 9 Holdsworth, 108–125.

Like a good many other common law writs its history can be traced back to the early age when legal procedure and administrative methods were still not distinguished, and, together with the other prerogative writs of *mandamus, certiorari* and the rest, its ultimate origin is in a simple command from the Crown to one of its officials. In the reign of Edward I there were several varieties of *habeas corpus* serving different purposes, such as to secure the appearance of a defendant or of jurymen. Gradually the courts acquired the habit of issuing the writ in order to bring before them persons who had been committed by inferior jurisdictions—particularly the courts of cities and local franchises. The motive of this policy seems to have been to enlarge the powers of the Courts of Westminster at the expense of local tribunals, and the result was not infrequently confusion and injustice. Parties were even allowed to use this process when they had been committed by judgment for debt so as to obtain their release and to defraud their creditors. It is not surprising, therefore, to find a steady stream of legislation restricting the scope of *habeas corpus*. At the end of the fifteenth century the common law courts had nothing more to fear from local jurisdictions. A new antagonist appeared in the form of Chancery, followed soon after by the Courts of Requests and Star Chamber. The writ of *habeas corpus* was now turned against this larger game. The common law courts were indignant when Chancery committed parties for suing at common law after they had been enjoined, and Chief Justice Huse proposed to release such prisoners by means of *habeas corpus* (1484). The Courts of Admiralty and High Commission were similarly attacked, but it was in the seventeenth century when *habeas corpus* fought its greatest battle. The Crown had endeavored to establish the right of imprisoning without trial upon a warrant signed by the Secretary of State and a few Privy Councillors, alleging "reasons of State." Against so serious a claim of state absolutism *habeas corpus* became in the words of Seldon "the highest remedy in law for any man that is imprisoned." Throughout the Stuart period *habeas corpus* was steadily used and improved by the courts of common law. But procedural difficulties stood in the way. *Darnel's Case* had shown doubts; the special command of the King was there held to be a sufficient return and this rule was only abolished by the Petition of Right.

There were also doubts as to which courts were competent to issue it. Many of these defects were remedied in the *Habeas Corpus* Act of 1679 which after much discussion finally passed the House of Lords—and then only owing to a mistake in the counting of the votes, so the story goes. By this act any judge during term or vacation must issue the writ unless the prisoner is obviously committed by lawful means. Prisoners are not to be imprisoned beyond the realm and the writ is to run in all privileged places. Later legislation at various dates introduced still further improvements. Some striking examples of its use in more modern times are *Sommersett's Case*,[1] where a writ of *habeas corpus* released a negro slave from confinement on a ship on the Thames, on the ground that an allegation of slavery was not a sufficient return. In 1798 the writ was used to insure a trial at common law of a prisoner who had been condemned by a court-martial.[2]

The reign of Charles II saw the re-establishment in a harsher form of the Church of England, while at the same time a number of experiments were made in the direction of converting open council government into a secretive form of cabinet government. The short reign of James II witnessed a rapid crisis. The determination of that monarch to pursue a religious policy which was contrary to that solemnly laid down by Parliament in a long series of statutes was the immediate cause of his fall. It may have been that his project of complete toleration for Roman Catholics as well as Dissenters was intrinsically an advance upon the partisanship of the Church as represented in Parliament. But it is impossible to discuss the merits of the policy when the methods of its promotion were so drastic and so completely contrary to the spirit of contemporary institutions. James II claimed that by his prerogative he could dispense individual cases from the operation of a statute; more than that, he even endeavored to suspend entirely the operation of certain of the religious laws. Upon this clear issue the conflict was fought out. After an ineffective show of military force James II retired to France, William III of Holland was invited by Parliament to become joint ruler with his wife, Mary II, James's daughter, and so "the great and glorious revolution" was accomplished. The terms of the settlement were

1 20 S. T. 1 (1772).
2 *Wolfe Tone's Case*, 27 S. T. 614.

embodied in the last great constitutional documents in English history, the Bill of Rights (1689) and the Act of Settlement (1700).

The principal portions of the Bill of Rights are as follows:

"That the pretended power of suspending of laws, or the execution of laws, by regall authority, without consent of Parlyament is illegall.

"That the pretended power of dispensing with laws, or the execution of laws, by regall authoritie, as it hath beene assumed and exercised of late, is illegall.

"That the commission for erecting the late Court of Commissioners for Ecclesiasticall Causes, and all other commissions and courts of like nature, are illegall and pernicious.

"That levying money for or to the use of the Crowne by pretence of prerogative, without grant of Parlyament for longer time or in other manner than the same is or shall be granted, is illegall.

"That it is the right of the subject to petition the King, and all commitments and prosecutions for such petitioning are illegall.

"That the raising or keeping a standing army within the kingdome in time of peace, unless it be with consent of Parlyament, is against law.

"That the subjects which are Protestants may have arms for their defence suitable to their conditions, and as allowed by law.

"That elections of members of Parlyament ought to be free.

"That the freedome of speech, and debates or proceedings in Parlyament, ought not to be impeached or questioned in any court or place out of Parlyament.

"That excessive baile ought not to be required nor excessive fines imposed; nor cruell and unusuall punishment inflicted.

"That jurors ought to be duely impannelled and returned, and jurors which passe upon men in trialls for high treason ought to be freeholders.

"That all grants and promises of fines and forfeitures of particular persons before conviction, are illegall and void.

"And that for redresse of all grievances, and for the amending, strengthening, and preserveing of the lawes, Parlyament ought to be held frequently.

"And they doe claime, demand, and insist upon all and singular the premisses, as their undoubted rights and liberties; and that noe declarations, judgments, doeings or proceedings, to the prejudice of the people in any of the said premisses, ought in anywise to be drawne hereafter into consequence or example."

After the death of Queen Mary (1694), William III ruled alone, until he in turn was succeeded by her sister, Anne (1702–1714), who was therefore the last of the reigning Stuarts; in order to secure the succession, the Act of Settlement was passed in 1700 which not only limited the descent of the Crown (in accordance with which the present royal family reigns) but also

added a few constitutional provisions supplementary to those of the Bill of Rights. It required the monarch to be in communion with the Church of England, and not to leave the country without parliamentary consent—an irksome provision which was soon repealed. Membership of the Privy Council and of Parliament was limited to British subjects of British parentage. It was likewise provided "that no person who has an office or place of profit under the King, or receives a pension from the Crown, shall be capable of serving as a member of the House of Commons." This attempt to limit the Crown's influence in Parliament was subsequently amended in order to permit ministers of the Crown sitting in the House of Commons by allowing them to seek re-election after their appointment to a salaried office. Such is the practice at the present day. Another chapter provided that judges should hold office during good behavior at fixed salaries, and that they should only be removable by His Majesty upon an address of both Houses of Parliament; the complete independence of the bench was therefore permanently established.

The attempts to restore the main line of the Stuarts soon became involved in foreign politics and developed into the familiar situation of an Anglo-French war which only concluded with the death of the reigning Stuart, Queen Anne.

The changes and chances of seventeenth-century politics had produced a great number of varying theories concerning the State and the nature of government. In the beginning of the century divine right is ranged against a parliamentarianism which looked to the middle ages for its justification. The period of the Commonwealth accustomed people to see a succession of different forms of government set up and then pulled deliberately down. The lesson was clear: the people had in their hands the power and the right to set up forms of government according to their fancy. A large number of political thinkers of different schools took up this idea, and were prepared to treat existing governments as if they had been the deliberate product of popular action. It merely remained to ascertain exactly what policy the people had proposed to pursue when they did this. We consequently find many different suggestions as to the form which this original contract, as they regarded it, received. The seventeenth century and much of the eighteenth were occupied in searching for forms of con-

tract which should afford a reasonable justification for political society, either as it existed, or as the philosopher thought it ought to exist. Out of this welter of speculation only a few names can be mentioned here. Undoubtedly the most remarkable of them was Thomas Hobbes whose greatest work *"The Leviathan"* appeared in 1651. Unlike almost all of his contemporaries, he entirely rejected the study of history as having any bearing on political science; instead, he pinned his faith to "geometry, which is the only science that it hath hitherto pleased God to bestow on mankind"—words which have a strangely familiar sound in these latter days. His outlook was entirely materialistic. All knowledge is derived through the senses; every idea is the result of an effect produced upon an organ of sense by the motion of an external object; felicity means success in getting what one wants. Were it not for civil government, life would consist of the ruthless competition of unmoral men for desirable things, and would be "solitary, poor, nasty, brutish and short." It is only the tremendous power of the State which protects the natural man against himself and his fellows, and from this power are derived the ideas of justice and property—for in the pre-civil state "that only is a man's that he can get, and for so long as he can keep it." Where other thinkers had conceived of society as involving a contract between ruler and subject, Hobbes devised a completely different scheme. According to his view, helpless and miserable mankind made a contract, every man with another, to submit to a ruler whom they all clothed with authority to govern them. This ruler was no party to the contract and is therefore bound by no limitations. Consequently it is impossible to talk about a sovereign having broken its contract with the nation (which was a common argument in the seventeenth century) for no such contract existed. Nor is there any justification for resistance to the sovereign. We seem to see in these theories a deep impatience with the turmoils of the Stuart period. Neither the antiquarianism of Parliament nor the mysticism of divine right had any meaning to the dry, penetrating, but narrow mind of Hobbes. The troubles of the Commonwealth, deeply involved as they were with religion, are reflected in his treatment of the Church. His own position seems to be that of a deist. He recommends that there be but one church in a state, and that under the absolute control of the sovereign

leviathan; he even asserts that the sovereign necessarily has full authority to preach, baptize and administer the sacraments, and that the clergy only perform these functions by delegation from the State, whose will is the source of both temporal and spiritual law. It is only natural that a century which was so animated by sincere religious dissension should either neglect or revile a thinker at once so original and so cynical.

If Hobbes represents the desperate longing for an omnipotent peaceful State which was natural in the midst of the darkest hours of the seventeenth century, it is in John Locke (1632–1704) that we find, after the storm had passed, a quiet summary of achievement full of the spirit of compromise. In the nineteenth century when it seemed that the leviathan had indeed come to life, Hobbes was to receive due recognition, but in the eighteenth century it was rather John Locke's influence which was paramount, for it was he was discovered a reasonable philosophical basis for the whole of seventeenth-century history, and more particularly for the Revolution of 1688. John Locke learned from history all that Hobbes refused to consider. He made a great plea for religious toleration and embodied it in the Constitution of South Carolina which he drafted on the invitation of the proprietors of the province, and his example was to be improved by William Penn in his form of government for Pennsylvania. It is to John Locke that we owe a reasonable theory of limited monarchy which was to become the creed of the Whig party. Locke's view of the contract was much less extreme than that of Hobbes. In his thought every individual conveys to society as a whole his right of executing the law of nature; all other natural rights he retains. Locke, therefore, brings us back to the old idea that the powers of the State are limited to certain purposes. It is his discussion of the mode in which those powers are exercised which has the greatest interest at the present day. His theory of reserved natural rights leaves a large place for religious toleration, while the limitations he places upon the State are more in accordance with history than is the absolute crushing leviathan which Hobbes conceived. Where Hobbes had considered law to be the command of the State, Locke returned to the notion of natural law—a conception which was easily reconciled with the mediæval view of law as the will of God. Where Hobbes had made law the tool of the State, Locke regarded it as the guardian of liberty.

Locke declared that the legislature is the supreme power in the State, and from this he deduced certain maxims of constitutional practice which, in fact, were the historical settlement reached at the end of the seventeenth century. And so beginning from general philosophical and theoretical considerations, Locke proceeds to give a philosophical defense of such very practical measures as the Bill of Rights, the Act of Settlement, parliamentary control over taxation, and the whole machinery of limited monarchy.

It seems that Locke was the first modern theorist to propound a doctrine of the separation of powers. He observed that legislation is (or in his day was) an intermittent function, while the executive, on the other hand, must never cease its activity. Consequently, the two are better assigned to different bodies, which, he observes, is almost universally the practice—and here we seem to see an example of that comparative study of institutions which had been prominent in England ever since the days of Fortescue, Sir Thomas Smith and others. In his discussion of the relations between the legislature and the executive, Locke very clearly is thinking of current politics although his treatment is confined to scrupulously general terms. How close this theory was to current practical politics can be seen where he urges the separation of legislature from executive; this was in a large measure achieved through the passage we have just quoted from the Act of Settlement excluding ministers from the House of Commons, which was passed only four years before the death of Locke. Locke's suggestions on the separation of powers were obviously derived from his observation of contemporary English practice; indeed, the easy way in which he seems to take the situation for granted is an indication that he felt it too obvious to need very detailed theoretical treatment. It is only a century and a half later that his work will be used as a basis for a re-discovery by the great philosopher Montesquieu of a general theoretical doctrine of the separation of powers such as Aristotle and Marsiglio had suggested in ancient and mediæval times.

John Locke, therefore, may be regarded as expressing to a peculiar degree the compromise and settlement which the nation had reached when the expulsion of the Stuarts and the accession of William III had enabled political passions to die down. His summary of the results of the great conflict remained for many years

the justification on philosophical grounds of the compromise which practical politics had reached, and with his work the tumultuous drama of the seventeenth century fittingly ends on a quiet and hopeful note.[1]

[1] Locke's theories have been aptly summarized in the following words: "It was a theory of a state of nature that was not altogether bad, and its transformation into a civil state that was not altogether good, by a contract that was not very precise in its terms or very clear in its sanction. It embodied, moreover, a conception of sovereignty of the people without too much of either sovereignty or people; of the law of nature that involved no clear definition of either law or nature; of natural rights, but not too many of them; and of a separation of powers that was not too much of a separation. It concluded, finally, with a doctrine as to the right of revolution that left no guaranty whatever for the permanence of the rather loose-jointed structure which the rest of the theory had built up. Yet this illogical, incoherent system of political philosophy was excellently adapted to the constitutional system which England needed at that time and which the Whigs actually put and kept in operation. It was a good, respectable, common-sense view of the features of political life that impressed a philosophical observer; it was strong in the individual parts, if not in their correlation, and it was far better adapted to make an impression on thinking Englishmen than were the more logical systems of Hobbes and Spinoza."—Dunning, *History of Political Theories; Luther to Montesquieu*, 367–368.

CHAPTER VIII

THE EIGHTEENTH CENTURY: INDUSTRIAL REVOLUTION

The eighteenth century is the great dividing line in English economic development between mediæval and modern times. The central point in its history is usually referred to as the industrial revolution, which was rather, in point of fact, a long and slow process moving only towards a crisis about the year 1760. Its results were to change the face of England completely; its mode of life, its source of wealth, even its colonial possessions were all radically changed as an outcome of this movement. So far the structure of the nation had been essentially mediæval; so too, had been its law. If we are to seek the fundamental notes of this mediæval policy we shall find them based upon the fundamental fact that the normal occupation of the bulk of the inhabitants was agriculture. The great source of wealth was the land, and such capitalism as existed looked mainly to the land for its profits. The social structure of society was built upon this idea. The unit of agricultural production was the manor, and this (in the form of the parish) was largely a unit of local government as well. The population was grouped in manors or in villages, each little group being the personnel of one unit of production. The legal aspect of all this is clearly visible. Land was the principal form of wealth, and therefore, the principal source of power, and the law had to take account of this situation. First of all the King's Court assumed complete control over the land and thereby over the landowners. In return it was necessary to strengthen their position as against the rest of society. The law of land was rapidly developed to an astonishing extent, and every means was adopted of protecting landed property to the fullest extent. It was only natural that the land should therefore be the symbol of economic and social permanence, and that efforts should be made to perpetuate the social system founded upon it. Even in the middle ages, however, there were the beginnings of other forms

of wealth, and as time proceeds commerce takes an increasing place in national life. Nevertheless for a long time it was the policy of the law to separate the two; it is curious to observe that merchants very nearly became an estate of the realm and occasionally we find what looks like a parliament of merchants: there was a chance that in England as in some other countries there might have grown up a House of Merchants in Parliament. The separation of commerce from the normal occupation of the nation was further emphasized by the fact that the merchants had their own organization and their own law. It is only as a result of many centuries of history culminating in the industrial revolution that these barriers were broken down; it is familiar knowledge that such bodies of mercantile law as those relating to bankruptcy and negotiable instruments for a long time pertained exclusively to merchants; indeed, a separate organization was set up to supervise the affairs of insolvent debtors who were not merchants and therefore outside of the law of bankruptcy. It is also only comparatively recently that the law has considered the possibility of a non-merchant being a party to a bill of exchange.

Although the middle ages were so predominantly agricultural, it is still possible and indeed very necessary to trace in them the beginnings of commercialism. In English history two commodities are of particular significance, wool and wine. Wool-growing was the great source of England's position in international politics during the middle ages. The wool which was grown in England was exported to Flanders, and there in the great Flemish fairs it was distributed throughout Europe. England's monopoly of wool was so effective that the Crown could afford to levy heavy taxes upon its export, and upon occasion could bring powerful pressure to bear on foreign nations by diverting the wool trade from one port to another, or even by suspending it altogether. Financially, the wool trade was conducted on a capitalistic basis. In its early days, the leaders of the industry were the Cistercian monks whose mode of life was to build their abbeys in remote places among the hills and occupy themselves with sheep farming. As for the smaller growers of wool, it seems that arrangements were made to buy up their crops in advance, the sale being effected through the assistance of foreign capital. It is significant that credit took the form principally of advanced payments to the

growers for future delivery. Middlemen were a prominent feature of the trade and behind them stood great foreign capitalists. The same was true of the important import trade in wine.[1] It is obvious that we have here complicated relationships involving very important interests, and we may be certain that the result must have been the development of a good deal of commercial law. It is typical of the middle ages, however, that this law should be not the law of the land but the law of a particular class of people, developed through their custom and enforced through their own voluntary organization. As for the capitalists whom we have mentioned, their place becomes increasingly important through the middle ages. In England a large part was played by the Jews until they were expelled by Edward I. Their place was then taken by various groups of bankers from the cities of Northern Italy—the financial center of London is still called Lombard Street. A considerable place too was occupied by certain religious orders whose international organization was a convenient machinery ready made for large scale banking.[2] Their considerable wealth also enabled them to undertake capitalistic operations. Indeed, this tendency of large religious organizations being deeply involved in finance persisted into modern times; in more than one country the principal cause for the expulsion of the Jesuits in the eighteenth and nineteenth centuries was a fear of their financial activities.

As for manufactures, development was at first most rapid in Flanders where English wool was made up on a large scale. It was to Edward III that credit is largely due for the establishment of the textile industry in England. His Queen was Flemish and it may be her connection with Flanders which led him to invite some Flemish weavers to settle in England. Nevertheless, the English textile industry was still purely domestic, that is to say, carried on in the home of the worker, and not in a factory.

The transition from this state of things to conditions which are familiar to-day was effected principally in the eighteenth century.

[1] M. Postan, *Credit in Mediæval Trade*, 1 Economic History Review, 234-26 (with which compare 5 Bulletin of the Institute of Historical Research, 176 178). For an interesting indenture dated 12 Sept., 1478, for the sale of wool to be delivered by 2 Feb., 1479, the purchaser paying £81 17*s.* down, and a further £58 3*s.* on delivery, see *Supplementary Stonor Letters* (ed. Kingsford), 12 (in 13 Camden Miscellany).

[2] Génestal, *Le rôle des monastères comme établissements de crédit.*

Wool growing had increased enormously and was conducted on a very large scale. This became possible through the great enclosure movements of the sixteenth and eighteenth centuries whereby a great deal of common land, together with land which once had been arable, was turned over to sheep farming. Besides this great change from crop raising to sheep rearing (which was the cause incidentally of a great deal of unemployment and agrarian unrest), the textile industry also underwent a great change. The already existing tendency for a number of textile workers to become dependent upon one employer was immensely increased by the introduction of machinery, and here we reach the greatest single cause of the industrial revolution. By means of machinery more work could be done at less expense and with less labor. Soon it became clear that the price also was reduced and the great movement began whereby trade gathered an ever increasing momentum. The more there was produced the more the demand increased, and in the end the manufacturers were able to some extent to set the pace of industrial development. The introduction of water power, and very soon afterwards of steam power, gave England a tremendous advantage, for ample supplies of coal were easily accessible. Consequently the industrial revolution pursued a much more rapid course in England than in the rest of Europe.

The task which faced the law was to meet these new requirements. Land was no longer to be its principal concern; other forms of wealth were demanding protection. As the growth of machinery proceeded the cost of equipping a factory became enormous and usually exceeded the resources of a single manufacturer. Various forms of co-operative effort had been inherited from the middle ages which were already familiar, at least on the continent, where there was a developed law of partnership in several varieties. Such forms of joint enterprise in seventeenth-century England were usually employed in colonial expansion or distant foreign trade. The law had now to consider some means of placing these advantages within the reach of smaller men who did not require the elaborate organization of such bodies as the East India Company, or the Bank of England. It was also a growing necessity that banking should be developed, and out of the practice of the London goldsmiths who would receive deposits and issue

against them interest-bearing notes,[1] there arose, first of all, the Bank of England (1691), and soon a large number of private banks in different parts of the country. The law had, therefore, to consider all the complicated relationships which were being created through the machinery of credit and joint enterprise. It is to the eighteenth century, therefore, that we must look for the rise of most of the law which is of a distinctly modern character, that is to say, of personal property in general (and especially of stock, shares and the like), of companies and their stock, partnerships, of negotiable instruments, contract, bankruptcy, and master and servant. In effecting these developments the eighteenth century achieved the transition from mediæval to modern times.

Politics had its part in the history of this development. The fall of James II had been due in large measure to the fact that the City of London and the financial interests thoroughly distrusted his policy. Although his opponents were, of course, drawn largely from the nobility, nevertheless, City interests played a considerable part. One of the most significant results of the Revolution of 1689 was the foundation of the Bank of England which was designed primarily to finance the French War, the founders lending a considerable sum of money to the government and using this government debt as part of their capital. In consequence the bank was closely connected with the Revolution settlement; it was generally felt through the country that any restoration of the Stuarts would imperil the bank, and as the bank's activities grew wider the country was less and less inclined to take this risk. The Whig party has, therefore, a marked commercial character, while the Tories were still apt to be representative of the landed interest.

The legal consequences of the industrial revolution were effected, partly through legislation, but more largely through the development of case law, and a little group of judges who were far-sighted enough to divine the direction in which events were moving were able quietly and without commotion to perform the great work of taking over the existing mercantile law and custom, and incorporating it into the law of the land. Of this we shall speak more in treating of the history of the law merchant.

[1] See Richards, *Early English Banking Schemes*, 1 Journal of Economic and Business History (1928), 36–76.

One other great result of the industrial revolution has been to produce a new internationalism. Internal commerce in many different nations was to develop along parallel lines and the basis of the new commercial law was in every case to be the old custom of merchants, and one of the features of this custom had been its growing international character. There was, therefore, a tendency for commercial law in different countries to proceed broadly upon parallel lines. Local diversities there were inevitably; they had been even more serious in the middle ages. But in spite of this some broad general features remained constant. At the same time international trade was taking a much greater place. More and more commodities passed from country to country and an increasing number of merchants were engaged in foreign business. This also emphasized the tendency for commercial problems to be considered from an international standpoint. The movement is one of the most striking features of our own day; international trade and finance are having their effect upon commercial law, and the time seems not far distant when commercial law will regain its mediæval aspect of internationalism.

Besides all this development in new directions there still remained the great bulk of the old law which the courts had been accustomed to administer. The law of real property, notably, was undergoing immense elaboration with results which were by no means satisfactory. If the landed interests were to retain their dominant place in national affairs, then agriculture would have to compete with the newer forms of commercialism. Great improvements were made during the eighteenth century in scientific farming, and agriculture made rapid strides as a source of wealth. The effective output, both in crops and herds, was increased and improved enormously, until it became clear that agriculture afforded opportunities for commercial enterprise. This development, however, was seriously hampered by the law of real property. Land could not take its place in a commercial scheme of things as long as it was so difficult to deal with it. The seventeenth and eighteenth century lawyers had developed elaborate methods of placing land beyond the control of the tenant in possession, and when they tried to retrace their steps in an endeavor to give the great landlord powers to charge and to sell, their remedies were equally cumbersome, uncertain and expensive. It is not

until the close of the eighteenth century that any substantial progress was made towards providing a simpler law of land, and to this day the process is still going on. At the same time there was a movement, not fully effective until the early years of the nineteenth century, for radically reforming the whole of the procedural side of law.

The most tremendous event in the eighteenth century was the French Revolution with which it closed, and a few words must be said here of its implications in legal and political science. These can best be illustrated by considering two great thinkers, Montesquieu who just preceded it, and Burke who was contemporary with it. In 1748 Montesquieu published his *"Spirit of the Laws,"* which, like his earlier essays, was an attempt to give a political interpretation to history.[1] The sources he used were Roman and more particularly English history. He classified the different forms of government and assigned to each its characteristic principle; thus despotism depends upon fear, monarchy upon honor, aristocracy upon moderation, and democracy upon virtue (in the Roman sense of the word). The corruption and fall of a government whereby it changes into another form he attributes to the corruption of its fundamental principle; but as long as the principle remains fairly pure he sees little to choose between the different possible forms. The really vicious situation is when institutions which are fitted for one principle of government are still forced to work although that principle has been replaced by another. Montesquieu tells us little about sovereignty, although he has a good deal to say about liberty. He regards liberty as best assured by the supremacy of law rather than of men, and to achieve this the best way, in his opinion, was the separation of powers. This part of his work is greatly indebted to John Locke. The aspect which he develops at most length is not the mere administrative convenience of specializing the functions of government, but rather the constitutional safeguards which result when each power operates as a check upon the others. It is this system of "checks and balances" which Montesquieu regards as particularly important, and as the secret of constitutional monarchy in England. It was he who had the romantic notion that English

[1] "Montesquieu, with all his faults and irregularities, is the father of modern historical research." Sir Frederick Pollock, *History of the Science of Politics*, 86.

constitutionalism was directly derived from the ancient Germans of Tacitus. *"Ce beau système a été trouvé dans des bois."* He even went so far as to develop a theory of the influence of geography upon politics. He is essentially modern in the emphasis which he places upon legislation. It is his theory of the separation of powers and his insistence upon its value as affording constitutional safeguards which are most important for our purposes, for he was read by influential men in America and has had a marked influence upon constitutional development in this country.

Into the causes and character of the French Revolution we cannot enter; but some of its results upon English political thought may well be mentioned. The greatest political thinker at this time in England was Edmund Burke, and anyone who wishes to have a summary of English political wisdom by an experienced statesman who could adopt a philosophical attitude without losing touch with practical events must read the writings and speeches of Burke. They are likely to remain for a long time an authoritative statement of the results which had been achieved by parliamentary government in the seventeenth and eighteenth centuries. At the present day his words are constantly upon the lips of the best English statesmen. His thought is characterized by its intimate contact with practical politics; never does he allow a theory to divert his attention from the practical problems of everyday government. A noteworthy portion of his work is in answer to Rousseau and to the theories of the rights of man. With a natural tendency to admire aristocracy, he felt that an extreme democracy as suggested by some theorists contained great dangers, and insisted that it was hazardous to abandon those sentiments for aristocracy which in his day seemed natural to mankind. He observes that a democracy is not affected by the fear which besets a monarch; when shameless acts are done the moral responsibility vanishes when spread among numerous persons, while the alleged liberty of a democracy is more often a delusion. The horrors with which the Revolution began made an increasing impression upon Burke as upon his countrymen, and had the practical effect of delaying reform for over a generation. To this result Burke largely contributed, nor must he be blamed overmuch for his caution at a moment when the wildest theories were being proclaimed in all seriousness. His speeches on America are the most

interesting for our purpose. Here in particular the political realism of Burke is apparent; he almost alone of British statesmen at the moment was prepared to face the facts, and having done so to advocate a frank acknowledgment of the situation as it actually existed. He poured ridicule upon the government for their weak attempts to compel recognition of a principle which had no relation to the existing situation, and it is here that the practical side of Burke's outlook shows to such advantage; he was the embodiment of the spirit of compromise, and appreciated fully the fact that situations slowly change, and that the change must be recognized frankly. He was prepared to state that the American colonies had entered upon the stage of adult political life, and to counsel the government to treat them accordingly. Perhaps the most interesting passages in his speeches on America are those where he shows that the demands of the colonists were the very same which Englishmen at home had made in a more heroic age, and where he stresses the deep respect for legality which characterized English political development, urging that this very spirit lay at the root of the American case.

The end of this chapter therefore brings us from the old world to the new, from the ruins of the Roman Empire to a crisis in another empire thirteen centuries later. We have seen the gradual formation of the English State under the Anglo-Saxon kings, which later was transformed by the Norman genius and furnished with the first necessity of government—a financial administration. Developing within that administration we have seen the germs in the reign of Henry II of the common law, while under his son we begin to find the claim that law and administration had now come to the parting of the ways, and the text of the Great Charter lays down the principle of the supremacy of law. Besides this internal limitation upon a powerful monarchy, we also see the Church using considerable influence in politics, and its rôle expressed in the terms of a general formula that the State, like the Church, may enjoy divine sanction (or at least divine tolerance), but nevertheless, religion is superior to politics. It is clearly asserted that there are things which kings cannot do, and in the middle ages there was a papacy powerful enough in many cases to punish monarchs who transgressed. We have seen, too, the growing weakness of law in the fifteenth century and the rise in

the sixteenth of administrative bodies using legal forms, which alone were adequate to meet the crisis under the Yorkists and early Tudors. When this movement had gone too far, the Stuart dynasty was to suffer for its failure to adapt itself to new conditions—although it is typical of English development that the really innovating party found its main support in history, and even in antiquarianism. With the Commonwealth there came a period unique in English history and its failure was as conspicuous. The Revolution completed the work of the Rebellion and expressed its results in a form more nearly legitimate. The strange, but fascinating, theories of Hobbes gave way to the reasonableness of Locke, and when a century later the French Revolution issued a challenge to all established governments, it was Burke who found an answer which served England and America equally well. That answer was an appeal to history, to experience, and to the traditional English habit of compromise and cautious reform—to what Montesquieu might have called the spirit of the common law.

PART II

THE COURTS AND THE PROFESSION

We now come to the history of the law courts and the legal profession. Few matters are more obscure than the early history of our courts, especially of the inferior or local jurisdictions. Compared with the courts of Westminster the local tribunals of the county and the hundred are centuries more ancient, and have a past stretching back to a very remote age. Into the great questions of the ultimate origin of the county and the hundred courts, which in the opinion of some writers extends back into Teutonic pre-history, it would be impossible to enter without a great deal of technical controversy. Questions equally grave and controversial also obscure the history of those jurisdictions which are called feudal—jurisdictions which competed with, and in one or two cases supplanted, the older institutions. Last of all there came the royal power and the erection of a hierarchy of courts which in the end has superseded all the local jurisdictions. We therefore have, roughly speaking, three main types of courts: the oldest is the communal system represented principally by the county and the hundred; next we have the feudal or seigniorial tribunals; while finally we have the royal courts at Westminster gradually overshadowing all the rest. Within each of these classes there exists the utmost variety. There was nothing approaching a centralized judicial system in England until the close of Edward I's reign. Only then do we discern a movement in the direction of knitting together the mass of miscellaneous jurisdictions into a coherent system, and in spite of all these efforts the numerous anomalies which existed in every one of these three classes very often survived unreformed. The further back we trace the history of these courts the more difficult it becomes to make a general statement which shall be approximately true about any of them. The Anglo-Saxon age in particular shows us countless examples of local variance, although it is significant that soon after the Norman Conquest faint signs of order begin to appear.

The remarks that follow, therefore, are only very general observations which will have to be taken subject to a good deal of modi-

fication if they are to be fitted into any particular case. Very broadly speaking the threefold division which we have indicated comprises three different classes of courts, each with its own separate type of history; but it is an essential part of that history that each type existed side by side with the others, and therefore was constantly influenced by them. The communal courts are characterized by a territorial jurisdiction coinciding with some administrative district within whose limits their authority extends. The seignorial courts are less definitely territorial in their character; their jurisdiction seems to depend instead upon a personal relationship between lord and tenant. This statement, however, is subject to some reservations since a purely personal jurisdiction of a lord over particular men is very apt, during the middle ages, to become gradually transformed into a jurisdiction over the land of those men. A jurisdiction which was originally personal will therefore become in time territorial, and it is characteristic of this process that such a territory often is of extremely irregular outline; indeed, it is quite common to find that there will be small islands of one jurisdiction scattered at some distance away from the main body. The most plausible explanation of this seems to be that these outlying portions were originally the property of a tenant under a personal jurisdiction, and that in the course of time this personal jurisdiction became territorial. Still further confusion between the two types is caused by the constant tendency for old communal jurisdictions (especially the smaller ones) to fall under the domination of some great man and to become in the end his private "franchise."

Both of these classes of courts, however, differ fundamentally from the third class, the royal jurisdiction. Both of the former were in flourishing condition and apparently equal to the requirements of the nation before the Crown began to intervene. One thing at least is very clear, namely, that the royal courts were intruders upon ground which had been occupied for centuries by older jurisdictions, and that the authority of these older jurisdictions was original and in no way derived from the Crown. This undoubted historical fact begins to be obscured by legal theory in the thirteenth century. By that date the royal courts at Westminster were in a period of active expansion and were prepared to make wide claims on their own behalf and on that of the King. Bracton lays down a general principle that strictly speaking the

King is the proper judge for all temporal causes, and that it is only the great mass of business that has compelled him to delegate judicial power to a number of judges, sheriffs, bailiffs and ministers. About the year 1260, therefore, a royal justice like Bracton is already considering the Crown as the sole fountain of justice. A generation later another royal official, whom we only know under the disguise of *"Fleta,"* presses this doctrine to its extreme limit. In an extraordinary chapter *Fleta* discusses all the courts of the land, and introduces each one of them with the significant formula that "the King has his court. . . ." Although it is clear that *Fleta* knows the historical falseness of this, nevertheless he insists that the King now has his court not only in Parliament, the King's Bench, the Common Pleas and the Exchequer, but also in the county, in boroughs, in hundreds, and in manors, even although he has no judge there, the decisions being made by suitors. With *Fleta*, therefore (about the year 1290), we come to the complete dogma that all judicial power is derived from the Crown. Clearly it is only the fact of the Norman Conquest, seconded by the organization of the Norman kings, that enabled England to be so united as this. In the course of two hundred years not only had the central courts at Westminster been erected and furnished with law and procedure where previously there had been none, but in addition the idea of royal supremacy and of the centralization of justice had so firmly taken root that it was possible to assert that all judicial power, whether it be in royal courts, seignorial courts, or the ancient communal courts, was exercised by delegation from the Crown. From this point onwards the character of the local courts was gradually being transformed in order to make them fit in with this theory. In the end, they were either to be abolished or virtually superseded by new institutions which would be in fact as well as in theory the creatures of the Crown.

Such, then, is the general trend of institutional history in the course of a thousand years. It now remains to consider in a little more detail the rise and fall of local institutions, and their gradual subjection to the central authority. First of all we shall treat of the communal courts: secondly, of seignorial jurisdiction and its relations with them: and finally, of the royal courts at Westminster which were destined to overshadow and destroy them both.

CHAPTER I

THE COMMUNAL COURTS

Beginning at the very bottom of the scale, the lowest institution we find is the vill or township. It is moreover the most complicated and obscure. Its history was possibly different in different parts of the country and is extremely difficult to disentangle from that of certain other institutions—the ecclesiastical unit of the parish, the social unit of the village, and the economic unit of the manor, each one of which is still the subject of learned controversy. It would seem as if the typical vill (if one can use the term of an institution which varied so greatly) would have looked something like this. There will be a little group of houses, sometimes in a cluster and sometimes ranged along an ancient road. Near by there will be the parish church, and in many cases there will be the hall or mansion of the lord of the manor, if it so happens that the vill coincides with a manor, which may or may not be the case; sometimes a manor consists of several vills, while at others the vill may contain several manors. Surrounding it there will be two, or more usually three, large fields. Each of these fields will be divided into a large number of long, narrow strips of about half an acre each, and every household in the village will own a greater or less number of these strips scattered irregularly through the fields. This system of scattered strips is very ancient and lasted long after the middle ages. It has been suggested that the method was imported by the Anglo-Saxons and was not native to England. The prehistoric field seems to have been a small irregular plot; the Celtic field which replaced it in England was apt to be oblong owing to the necessities of plowing. It seem also to have been a peculiarity of Celtic agriculture to prefer hills or elevated ground, while the Saxons introduced valley settlements. The Saxons, moreover, were accustomed to use the large team of eight oxen to draw their plows; this, of course, gave more power, but made turning more cumbersome. Consequently it became necessary to plow a much longer furrow in order to secure the advantage of the larger team, and hence the long nar-

row strips—but why they were scattered, is still a mystery. It is not uncommon for fields in England at the present day still to bear traces of these arrangements; on the hillside Celtic divisions may still be found represented by the banks caused by constantly plowing the same plot, while lower in the valleys the long, narrow strips of the mediaeval field may be discerned. Photographs from an aeroplane are particularly useful in revealing these features.[1]

The one bond which holds the vill together is a system of communal agriculture. The machinery necessary was expensive, for the heavy plow of eight oxen was beyond the means of any individual villager, and so we find that the vill co-operated in the performance of a good many of the more difficult operations of farming. Besides this, after harvest the fields were thrown open and all the villagers turned their cattle into them, as well as onto the field which for that year was remaining fallow (for the general system was to have three fields one of which was left fallow each year). There were, of course, very numerous complicated details which had to be settled in order to work this system of co-operation, and chief among them are the various rights of common; involving as they do many extremely difficult questions of early history and pre-history, it will be impossible to discuss them here.

From what has just been said it will be obvious that there were many features of the agricultural life of the vill which would need regulation. It is a great question how these matters were settled. Was there some sort of assembly as part of the constitution of the vill, which had authority to decide these matters and to enforce these arrangements upon a recalcitrant villager? A great deal of search has failed to reveal any trace of a moot attached to the tun or vill. This negative result has only added one more element of mystery to the mediaeval village. Whatever its origin, the mediaeval village community was dissolved in the sixteenth and eighteenth centuries as a result of the great enclosure movements promoted by landowners with two distinct objects—first, to abandon the old system of strips, re-survey the land and allot to each holder a compact area instead of his scattered strips, and

[1] See some remarkable photographs in E. C. Curwen, *Air-Photography and Economic History: the Evolution of the Corn-Field* (Economic History Society).

also to enclose portions of the common land and restrict them to private use, generally of the lord of the manor. To the eyes of some historians the co-operative element in the village community appears so strong that they describe it as an agrarian communism; but at this point we again touch upon a difficult and controversial subject upon which we can here say no more than that it is almost as difficult to prove a true agrarian communism as it is to find the modern notion of individual private property in land. There has been a great deal of conjecture as to the probable character of the primitive village community and much of it has removed the question from the realm of history into that of speculative pre-history.[1]

Besides this powerful economic bond which produced a unity from within, as time went on there came constant pressure from without which tended to the same result. Especially after the Conquest and down to the middle of the thirteenth century, the vill was being constantly used by the central authorities as the lowest unit of local government. As the Crown interfered more and more with local questions, so we find more and more reference in public documents to the vill, first one and then another duty being thrust upon it. The middle ages were fond of the very rough-and-ready, but effective, method of imposing a duty upon a group of people and holding them jointly and severally bound to perform it; any arrangement for apportioning the burden among the individual members of the group was their private concern, the Crown refusing to take any notice or to give any assistance to the process. At the close of the twelfth century the Crusades caused a good deal of taxation. The method by which it was assessed was simple; each county was assigned a quota proportionate to its estimated wealth (this estimate is the technical meaning of the word *taxatio*); the county then divided this quota in a similar manner among the hundreds and the vills, and so a vill would be responsible for raising a particular sum of money—no doubt by negotiation among its members.

The vill is most remarkable, however, for its place in the system of police and criminal procedure.

[1] Sir Paul Vinogradoff's article "*Village Communities*" in the Encyclopædia Britannica is a good introduction to the literature of the subject. The works of Maitland, *Domesday Book and Beyond* and *Township and Borough*, and the writings of Seebohm and Vinogradoff treat it more technically.

"It ought to attend the court held by the Justices in Eyre. It ought to attend the sheriff's turn. It ought to attend the hundred and county courts whenever it has any crime to present. It must come at the coroner's call to make inquest when a dead man's body is found. It is bound to see that all its members who ought to be in frankpledge are in frankpledge. In some parts of the country the township is itself a frankpledge, a tithing, . . . and in this case it is responsible for the production of any of its members who is accused of crime. Apart from this, it was bound to arrest malefactors; at all events if a person was slain within its boundaries during the daytime and the slayer was not arrested, it was liable to an amercement. . . . Again, from of old it was the duty of the township to raise the hue and cry and follow the trail of stolen cattle. . . . Moreover, it was the common practice to commit prisoners to the charge of the *villata*, and then if the prisoners escaped the *villata* was amerced. So if a malefactor took sanctuary, the neighboring townships had to watch the church and prevent his escape. Most of these liabilities can be traced back into the reign of Henry II." [1]

The thirteenth century statutes systematized the police powers of the vill; watchmen were to be kept throughout the night and the assize of arms enforced; in 1252 constables were to be appointed, and in 1253 vills were ordered to provide at their own cost the necessary weapons, while, as we have already said, the Statute of Winchester in 1285 consolidated these previous enactments for the rest of the middle ages. From all this it will be clear that the vill could hardly escape being many times amerced, and it seems that the inhabitants were jointly and severally liable to find the money.

Finally, the vill had very important duties in the system of presentments. When a crime occurred within the vill it was the duty of the reeve and the four best men to report it to the hundred court and if possible to produce the guilty party, while on numerous occasions the King's Justices would summon the vill where a crime was committed (together with four or more neighboring vills, all appearing by their reeve and four best men) to pass upon the guilt or innocence of a prisoner accused of crime.

The next jurisdiction immediately superior to the vill is the hundred.

The term "hundred" occurs in various parts of Europe as an administrative unit, and great controversy has arisen as to its ultimate origin, either a hundred families or a hundred settlements. Into this discussion we cannot enter; it will be enough to say here

[1] *P. and M.* 564–565.

that the hundred appears at any early date in English history and that in the middle of the tenth century we have an ordinance by King Edgar concerning its duties which gives us a fairly clear picture of how it worked.[1] To begin with it is quite clear that the hundred was ruled by a court—and herein lies the great difference between the hundred and the vill. King Edgar commands that the hundred meet every four weeks; thieves are to be pursued and judgment executed upon them, for the hundred is executive as well as judicial and must catch its criminals as well as try them. Contempt of the hundred's decisions is punished by a fine and on the fourth offence by outlawry. In following the trail of stolen cattle one hundred may call upon another to assist. Finally, the hundred is ordered to establish fixed terms at which parties are to appear. It would therefore seem that at this date (not later than the year 975) the hundred was a distinctly active institution, and probably the one with which lesser men were more generally in contact. By the time we get to the Norman Conquest the hundred is being treated by the Norman administrators as the most convenient of the smaller units of government. The *Dialogue of the Exchequer* tells us of the rule established by that court as a result of the numerous assassinations of Normans, presumably by Englishmen. In order to check this it was ordained that every hundred wherein a Norman was found slain by an unknown hand should be liable to a very heavy murder fine. As time went on the hundred was allowed to relieve itself of the fine by proving that the dead man was not a Norman but an Englishman;[2] in the end the races had become so mingled that it was impossible to maintain this procedure of "presentment of Englishry" and the murder fine was abolished by Edward III. The principle of making the hundred liable in respect of undetected crimes was not abandoned, however, and the Statute of Winchester (1285) lays down a general rule that the whole of the hundred where a robbery was made shall be answerable for it unless they can produce the offender.

By the Assize of Clarendon (1166) still further reforms were made in the working of local courts including the hundred. Chapter I ordained that in every county and in every hundred the

[1] Translated in Stubbs, *Select Charters*.

[2] The passage is translated in Pound and Plucknett, *Readings*, 59.

twelve most lawful men of each hundred and the four most lawful men of each vill should be sworn to present any man who was suspected of serious crime either to the King's Justice or to the sheriff. If the hundred or the vill had been successful in capturing a suspect, they were to deliver him over, accompanied by two lawful men "to bear the record of the county or the hundred"—in other words to state verbally the circumstances under which the prisoner was captured.[1] In 1234 a royal ordinance declared that hundred courts had been held too frequently and that rich and poor had been equally oppressed thereby; it was therefore ordained that they should meet every three weeks instead of once a fortnight as heretofore. It may be observed in passing that this is not the only complaint which we hear during the middle ages of too many courts and too much justice; earlier still Henry II admitted that the country had suffered grievously "by reason of the multitude of justices, for they were eighteen in number," reducing their number to five (1178).

The hundred court (or, as it was more usually called, "the hundred" simply) was under the presidency of an official called the hundred man or the reeve, but there was soon developed a practice for the sheriff to farm the profits of the hundreds within his jurisdiction, and to appoint his deputy to preside over the hundred. As in most ancient courts the judgment proceeded from the whole body of people who constituted the court, and in the case of the hundred these people ("suitors" as they were called) seem to have been usually of unfree status. It soon became the practice for the obligation of attending the court to be restricted to the owners of particular pieces of land—another peculiarity which is common in the middle ages. We have already mentioned the success of the sheriff in securing control over the hundred by appointing one of his underlings as bailiff of it; his influence was further increased by means of the "sheriff's turn." Twice a year every hundred held an especially full meeting which was attended by the sheriff, at which there came to meet him the reeve and the four best men of each vill in the hundred to undergo a searching examination at his hands. They had to lay before him their suspicions upon the members of their community; those

1 The text is in Stubbs, *Select Charters;* for an extract, see below, p. 101.

suspected of grave matters were arrested by the sheriff and held for the King's Justice, while less serious offenders were amerced by the sheriff. As we have said, the persons amenable to the hundred jurisdiction were almost always unfree, but for the purposes of these specially important meetings twelve freeholders were appointed to revise the presentments by the vills.[1] Upon the occasion of the sheriff's turn a thorough investigation was always made of the condition of the frankpledges, of which we shall speak later. The ordinance of William the Conqueror separating ecclesiastical from temporal jurisdiction in the hundred court has already been mentioned. There seems, however, some evidence for doubting how far it was observed, for there appear to be later traces of considerable activity on the part of the archdeacon in the hundred courts.[2] In the next chapter we shall note the effects of many hundreds falling under the influence of lords and becoming private property.

We now come to the county court, or "county" as it was more simply called, for it must be remembered that in the early Norman period administration and adjudication were still not separated, and there was hardly need for the word "court"—and even when the word does occur it does not bear necessarily the modern meaning of an organ of justice. The county is the most ancient of English institutions. Many of the individual counties are directly descended from the ancient Anglo-Saxon kingdoms of the age when the land was divided into numerous petty realms. In such cases as this the county court is the direct representative of the national assembly of a once independent kingdom and is presided over by an alderman, who was sometimes a member of the ancient royal family. It seems that some other counties, however, are of later origin and were deliberately erected as units of provincial government in imitation of the place which the ancient county now occupied in a united England. The history of the county falls into two periods; in the first the Crown is endeavoring to secure complete control over the county organization; in the second, that control having been acquired, we see the steady decline of the county in practical importance. Its relations with the Crown we shall discuss later.[3] The original jurisdiction of the

[1] See below, p. 97, n. 1.

[2] Leges Henrici Primi, VII, 3 (in Stubbs, *Select Charters*).

[3] Below, p. 64.

county apart from royal interference was apparently unlimited, but as time goes on it steadily declined, although the sheriff (as distinct from the county) acquired a good deal of jurisdiction by means of royal writs of *justicies*. When the county was acting in its original capacity its constitution was analogous to that of other primitive English courts. The court consisted of suitors who in later times, at least, were frequently obliged to attend by reason of holding particular pieces of land; it was a valuable privilege to be relieved of this duty. Meetings were monthly and the judgments were given by the whole body of suitors. The immense amount of business at all times before the county made it necessary to adopt some sort of specialization, and we frequently find that "rear counties" relieve the full court of some of its detailed work.

Just as the hundred was visited twice a year by the sheriff, so the county was visited at intervals by the King's Justices in Eyre. On such occasions an imposing assembly of many hundreds of people attended the royal commissioners; every vill and every hundred and all the cities and boroughs were represented by juries or by lawful men, and a merciless inquisition was made into all the deeds and misdeeds of the county since the last visitation.[1]

In early times there seems to have been no limit to the jurisdiction of the county court; civil and criminal cases, pleas common and royal, were alike within its power. The steps whereby this unlimited competence became reduced to the petty business of forty shillings or less have not been traced, nor is it clear whether the rise of the central courts was more truly the cause or the result of the corresponding decline of the county. Only a few of its original functions survived the fourteenth century. Its original representative capacity dating from Anglo-Saxon times seems to be preserved even to this day, for it appears that the elections of members of Parliament (except those for cities and boroughs), although conducted by ballot, are still technically meetings of the county court. Then again, as long as the real actions by writ of *præcipe* lasted, it was necessary to commence proceedings in the county court. Finally, as long as outlawry endured the county

[1] See the full contemporary report published by the Selden Society in *The Eyre of Kent*, and Bollard, *The General Eyre*.

court played a large part in the procedure. As for the rest, its major judicial functions went to Westminster, while minor cases and a good deal of its administrative work were often transferred to the justices of the peace. Powers which it once seems to have exercised in the nature of taxation and legislation were, of course, transferred in time to Parliament.[1]

The county was never a "court of record" in the eyes of the superior courts at Westminster,[2] and its rolls (where rolls were kept) were not admissible in evidence on the same basis as "solemn" records; instead, when a plea was removed from the county to the Court of Common Pleas, four knights came up to Westminster and recounted what had happened—and on one occasion we even find them ready to wage battle by a champion in support of the truth of their unwritten "record."

1 On the county court see Morris, *The Early English County Court* (1926), and Plucknett, *New Light on the Old County Court*, 42 Harvard Law Review, 639–675.

2 Except for outlawry proceedings.

CHAPTER II

SEIGNORIAL JURISDICTION

Besides all this there is the second aspect of the courts we have just described, namely, the effect upon them of the local territorial magnate. Here we come to an extremely obscure and difficult subject. The sources of the authority of a great lord or baron can usually be traced with some confidence, but the rise of numerous petty lordships all over the country and their effect upon the existing communal organization are a matter of great complexity. It is even difficult to classify the different sources of power which a local lord could exercise at various times. In some cases the lord's jurisdiction was personal; in others it was territorial; and in many cases it is impossible to draw the line. On the one hand we have the development of the manor, and, closely connected with it, of the view of frankpledge; on the other it is clear that in many cases the whole organization of the hundred court fell into private hands, and it is even fairly common to find that besides owning the hundred court the lord will even exclude the sheriff entirely, and instead of the sheriff's turn the lord's steward will hold a "court leet."

The manor as it existed in its typical form in the England of the thirteenth century is the product of a large number of different lines of development, some of them of very ancient date, which gradually converged to form one institution. One of its most striking features is the fact that all the tenants hold dependently of the lord of the manor. The origins of this may perhaps be sought in the tendency of small landowners to commend themselves and their land to some local magnate who seemed more likely to give them protection during such troubled times as the Danish invasions and the fairly constant wars between petty kingdoms. The weakness of the central power, too, undoubtedly promoted the growth of small local jurisdictions which were ready to undertake the task of repressing crime and organizing military defence. This process was very probably hastened by the heavy burden of taxation. In many jurisdictions to-day it has been

found necessary to curb the activities of the capitalist who takes advantage of a landowner who is unable to meet his taxes. In pre-conquest days no such limits were ever thought of, and it is extremely probable that a great deal of free land was converted into land dependently held under the pressure of taxation. This did not mean that the poor owner was dispossessed; the change was principally to burden him with services in money, labor or products payable regularly, in return for which the lord took upon himself the public burdens of the property. In this connection it is essential to remember that taxation in the middle ages did not usually recur at regular intervals; the small man who had little economic reserve might therefore have to meet sudden liabilities quite beyond his means, although if those liabilities had been evenly spread over a length of years they would have been much less burdensome. These dependent tenants were, it seems, originally freemen; there is no evidence of any extensive number of slaves or bondmen in early Anglo-Saxon England. In the course of time, however, the burdens upon these tenants steadily increased; more and more labor becomes due, and the increasing arbitrariness of its exaction will emphasize the baseness of the tenants. By the time we get to *Domesday Book* the development of serfdom has rapidly proceeded. On many manors it seems to be completed; on others a few faint traces of freedom still remain, and this is particularly so on the vast but scattered estates of the Crown. Throughout the middle ages these "sokemen of the ancient demesne" will be accounted as slightly higher than the villeins, and centuries later we shall find ambitious bondmen having lawyers search *Domesday Book* for them in the hope that it may turn out that their manor once formed part of the ancient demesne of the Crown.[1] In the majority of cases, however, these once free tenants became servile. Besides this lordship over land there was a good deal of personal jurisdiction. There are various origins for this also. In Anglo-Saxon times we find frequent grants of a jurisdiction called "sac and soc," which appears to mean the right to hold a petty court, to compel tenants to attend it, and to take profits from it. In those cases where a manor contained freemen as well, there may have operated the universal

[1] These peculiarities did not obtain on all Crown lands, but only on those which it possessed at the time of *Domesday Book*.

feudal principle that every lord can hold a court for his free tenants. Where the whole area of an ancient village community had fallen into the power of a lord it was natural that he should supervise the whole business of arranging the agricultural economy of the inhabitants, for, in spite of all the feudal superstructure which the common law has erected, the foundation of the manor is almost always an ancient village community.

To all this must be added the system of frankpledge which later became typical of a good many manors. Its history can be clearly traced back to the Anglo-Saxon period where we find the institution of fri-borh. "Borh" is the root which we have in the modern word "borrow," and seems to have the significance of security or surety. Its general feature is the provision for every person of some other persons who shall be borh or security that whatever moneys have to be paid will be forthcoming, and that if necessary the party can be produced in court. A master was always borh for his servants; members of a family might be borh for one another; or guilds might be formed whose members undertook to be borh for their brethren. To all this must be added the obscure institution of the tithing whose root significance is a group of ten men, naturally suggesting some intimate relationship with the hundred. Eventually the tithing became a territorial division with a tendency to coincide with the vill or township, and the tithing man, its head, became the village constable. Cnut required his subjects to be in tithing and in borh as well, and regular means were established for ascertaining that every person (who was not of some substance) was duly enrolled in tithing and in borh. This machinery was operated by the sheriff through the hundred court. At the time of the Conquest it seems that lords were able to shift their responsibility of being borh for their tenants on to the tenants themselves; this change was not very difficult, for the lord in many cases either owned or controlled the hundred court which had the duty of working the tithing system. The result was known to the Norman lawyers as frankpledge, and lords who owned hundred courts had also the right (which normally belonged to the sheriff) of verifying the proper enrollment of every tenant in a frankpledge. This was called "view of frankpledge." [1]

Under seignorial influences, then, we have seen the vill gradu-

1 For all this see Morris, *The Frankpledge System.*

ally falling under the control of the lord of the manor, save only for a few important police duties which the Crown imposed upon the vill direct, and even here it may be that the lord found ways of taking a profit. The institution next above the vill, the hundred, likewise fell into private hands in numerous cases. In some instances, even, the lord of a hundred could exclude the sheriff from his turn in that particular hundred and hold it himself as a "court leet." But when we come to the county, seignorial influence was less easy to assert. In one or two cases the office of sheriff became hereditary in a great family, but this advantage was soon discounted by the strictness with which hereditary sheriffs, like all other sheriffs, had to account to the Exchequer. Even the appointment of an earl did not have the effect of putting the county into private hands; the county was still administered by a royal sheriff accountable to the Crown, the earl only receiving the third penny. A few counties became palatine, that is to say, exempt, or almost so, from royal jurisdiction (Chester, Lancaster and Durham); for this there were definite military reasons, as these border counties had to be kept almost all the time on a war footing as a defense against the Welsh and Scotch. The processes which went on in the township and the hundred, the Crown refused to tolerate in the county; and so the county became the basis of royal power in local government.

We have therefore traced, very briefly, the characteristics of the old communal jurisdictions, together with their partial subjection to the growing forces of seignorial jurisdiction. The only place where these forces were checked was in the county, and their antagonist there was the Norman monarchy. We now come, therefore, to the consideration of the power of the Crown over the more ancient local jurisdictions.

CHAPTER III

THE CROWN AND LOCAL COURTS

The unification of England by the Anglo-Saxon kings brought them into contact with the problem of local institutions. It can hardly be said that they solved it, for throughout the Anglo-Saxon period the center of government was the shire rather than the King himself—indeed, the idea of national institutions centering in the Crown is characteristic rather of the Normans than of the Anglo-Saxons. For all that, the Anglo-Saxon Crown did begin a policy of establishing connections with local institutions, and, as far as circumstances permitted, of exercising some sort of control over them. The shire or county, as we have said, frequently represented an ancient petty kingdom, and its titular head, the alderman, represented the ancient royal family. It is clear, therefore, that the alderman might be expected to uphold local institutions against any attempt at centralization. This, in fact, seems to have been the case, and the situation was soon met by placing beside him a new official, the King's reeve, who was answerable to the national King and not to the alderman. The duties of the King's reeve seem to have been very miscellaneous, including both administration and judicial business. It was inevitable that as time went on the King's reeve should grow in importance at the expense of the alderman, and that finally he should take the alderman's place and become the principal officer of the shire under the name of "sheriff" or "shire reeve." The complaints of his extortion and oppression are constant in the later Anglo-Saxon age, and it is clear that the Crown had some difficulty in maintaining control over its own sheriffs. After the Conquest there was a tendency to regard the English sheriff as the equivalent of the Norman *vicomte* and to develop the office upon those lines. The Norman kings steadily resisted this; they were powerful enough to control even the very powerful sheriffs of the late eleventh century, and to use their local influence in the interest of the Crown. They therefore did not hesitate to appoint as sheriffs men of considerable importance. After a long period of political

struggle, the Crown finally adopted the policy of limiting the sheriff's tenure to one year, and of choosing him from the upper middle class of landowners. The principal factor in controlling the sheriff was the annual accounting at the Exchequer. Unusual situations were met, however, by extraordinary means, and more than once large numbers of sheriffs were summarily deposed, while Henry II's reign has left us some illuminating documents concerning his Inquest of Sheriffs—a general inquiry into the misdeeds of those officers.[1] It is not an infrequent occurrence to find a wholesale removal from office of other ministers and even judges,—another famous example was when Edward I removed all the judges,—for in the middle ages, as now, the enforcement of political morality was apt to be spasmodic rather than continuous. Into the political history of the sheriff's office we cannot now enter.[2] For our purpose the important aspects are the effect of these devices upon judicial institutions. At the time of the Norman Conquest the sheriff, as the King's representative, enjoyed a good deal of judicial power, particularly over pleas of the Crown. The county court, on the other hand, had unlimited original jurisdiction in civil matters. This jurisdiction seems to have continued regularly, for it was to some extent independent of the sheriff's control, since the judgments proceeded from the suitors and not from the sheriff, at least until the rise of the rule (early in the twelfth century) that no man need answer for his freehold without a royal writ; this seriously reduced the most important part of its jurisdiction—*i. e.* its right to hold pleas of land. The sheriff's powers as a royal deputy caused the Crown a good deal of anxiety, for there was no effective means of controlling him, except the somewhat desperate remedy of discharging him when popular unrest grew too strong. In the Norman age a number of attempts were made to find some check upon his powers as a royal judge. Sometimes the Crown appointed a permanent justiciar to sit in the county; the office of coroner was developed in order to serve as a check upon the sheriff; by the Great Charter it was declared that no sheriff should for the future hold pleas of the Crown. This definitive solution robbed the sheriff of a great deal of his ancient power, and only became

[1] Printed in Stubbs, *Select Charters*.

[2] It has been explored in Morris, *The Mediæval English Sheriff*.

workable because the Crown had been steadily developing other means for disposing of Crown pleas. It was an ancient device for the Crown to send out travelling officials who should inquire into the conduct of local officers and hold the royal court in the localities they visited. Sometimes their commission was general; at others they were specially delegated for the trial of some particular action. We thus have numerous references to royal commissioners sitting in the county court for the transaction of some particularly important business. Henry II systematized some early experiments of his grandfather Henry I, and sent travelling justices on several occasions through the realm. In the thirteenth and fourteenth centuries these justices are called Justices in Eyre and their session in the county court was an impressive demonstration of the royal power over all sorts and conditions of men from the baronial owners of great franchises and the sheriffs, down to the meanest villein. The removal of pleas of the Crown from the sheriff, accompanied by the transfer of that jurisdiction to the Justices in Eyre (and to certain other commissioners or travelling justices as the Eyre became obsolete), and the centralization of pleas concerning land in the hands of royal justices sitting by royal writ, mark the permanent subjection of the county and all its officers to the Crown.

The process was carried even further. Just as the King's justices went around the country sitting in each county court for the transaction of all sorts of business and a general inquiry into abuses, so the sheriff himself traveled around his county sitting in each hundred court twice a year. Here he acted strictly as a royal deputy, serving merely as a *liaison* between the central authority and local institutions, for since the Great Charter he could no longer "hold" pleas of the Crown, but only "keep" them, that is to say, guard the prisoners and make memoranda of the circumstances, which were to be laid before the King's commissioners at their next visitation; and by the time of Bracton and *Fleta* it will be the accepted theory that not only the sheriff's turn, but also its equivalent, the "court leet," are royal courts held in virtue of a presumed delegation of power from the Crown. In short, the Crown, for most practical purposes, is the fountain of justice.

CHAPTER IV

THE JURY

It is in this interplay of royal and local institutions that the origins of the jury are to be sought; so we can now appropriately turn from the study of the vill and the hundred to the growth of the system of presentment which was so prominent a part of their constitution, and to the later transformation of that system into a method of trial as well as accusation. At the same time, the county's loss of effective jurisdiction over pleas of land was intimately connected with the rise of the royal writ, and this will be almost synonymous with the use of an assize or a jury of twelve. The criminal jury, therefore, can be treated here because it grew out of the natural expression of the vill and the hundred; but the civil jury in the old real actions was based (as we shall see) upon a somewhat different, though related, idea, which only came to an end with the abolition of real actions. The modern civil jury, it must be remembered, is descended from the old criminal jury through the action of trespass which was at first criminal and later civil in its character.

The discussion may well open with Maitland's definition of the jury: a jury is a body of neighbors summoned by a public officer to answer questions upon oath. It will be seen that there is nothing in this definition which restricts the jury to judicial proceedings; on the contrary, the definition deliberately makes room for the fact that the jury, like so many institutions, was an administrative device which only later became confined to courts of law.

Ever since the seventeenth century when juries began to express sentiments against the government, there has been a tendency for the jury to become, at least in popular thought, a safeguard of political liberty. It is only natural, therefore, that its history should have been idealized and traced back for patriotic reasons to the supposed golden age of Anglo-Saxon institutions. Various theories have been proposed. According to one the jury is descended from the doomsmen who find the judgment and declare the law and custom in the ancient communal courts. This ex-

planation, however, is by no means satisfactory, for the doomsmen did not find facts (for which there was other machinery available) but declared the law which applied to a state of facts which had already been established. A second suggestion would seek the origin of the jury in the compurgators, of whom we shall speak later; this is open to the objection that the compurgators were summoned by a party and not by a public officer, and could not be compelled to act unless they cared to. A third and more plausible suggestion would see an origin of the jury in a remarkable passage in the laws of King Ethelred promulgated at Wantage, which probably dates from about the year 997.[1] It is this:

"And that a gemot be held in every wapontake; and the xii senior thegns go out, and the reeve with them, and swear on the relic that is given them in hand, that they will accuse no innocent man, nor conceal any guilty one. . . ."

It cannot be denied that we have here a remarkable anticipation of the Assize of Clarendon which later was to establish as a regular procedure the presentment of suspected criminals by the hundred. There are one or two other traces in various parts of Scandinavia which may point in the same direction. Even if we are hardly justified in concluding that the Scandinavian races by a way of their own had actually reached the same result as Western Europe did by means of a different history, still it is very possible that this institution might have become a sort of jury if its history had not been interrupted. It is not unusual to find that two different systems independently come to substantially the same conclusion; but when the historian sees the similarity of the conclusions he must beware of assuming that they are the result of direct contact, unless that contact can be proved by independent evidence. It may well be that this passage in the laws of Ethelred, enacted with a view to the Scandinavian institutions prevailing in that portion of England which had been occupied by the Danes, represents an independent tendency of Scandinavian law. Secondly, before we are entitled to see here an origin a

[1] The translation here given is from Stubbs, *Select Charters*. For comments, see 1 Holdsworth, 12 n. 10 (who identifies the twelve thegns with the twelve freemen of the hundred mentioned above, p. 86, and Vinogradoff, *English Society in the Eleventh Century*, 6. The hundred in the Danish part of England was called a wapontake.

of the jury, it will be necessary to establish continuity between the Law of Wantage and the jury as it existed after the Norman Conquest. This it is impossible to do, and here is the second lesson for those who would undertake historical investigation. The appearance of a principle or institution in one age, followed by the appearance of the same or a similar institution at a considerably later age, must not lead one to suppose that the later is derived from the earlier. Before this conclusion would be justified further evidence of continuity must be adduced; in the case now before us there is a gap of nearly two hundred years between the Wantage enactment and the next appearance of the presenting jury. Until that gap has been filled by showing continuity between the Anglo-Danish institution and the jury which is continuous from Anglo-Norman times, it would be unsafe to look to Ethelred's law for the origin of the grand jury.

The history of the jury has now been settled by the researches of Brunner (1872), supplemented by those of Haskins, who from newly discovered evidence filled in the gap which Brunner had had to admit. This history certainly goes back to the early ninth century, when we find the Emperor Louis the Pious, son and successor of Charlemagne, ordering in 829 that for the future the royal rights shall not be ascertained through the production of witnesses, but by the sworn statement of the best and most credible people of the district.[1] It seems that the government had little faith in the production of witnesses by parties who were disputing its claims; such testimony, it was felt, was sure to be interested. Instead, the Emperor undertook to compel the most considerable people of the county to declare upon oath what the customary royal rights were, and it may very well be that this method was more likely to produce the truth than the voluntary testimony of witnesses supporting their friends against the government. If we put ourselves for a moment in the place of a contemporary, we might imagine that there would be some grumbling at superseding an ancient institution of witness proof by the high-handed proceeding of compelling people selected by the government to speak on oath, whether they wished to or not. It might have seemed, perhaps, that the administration had usurped dangerous powers and was settling disputes in its own favor by un-

[1] The passage is translated in Pound and Plucknett, *Readings*, 141.

orthodox methods. To such an objection, if ever it were raised, history has given an answer; in the course of a thousand years this drastic administrative machine has been transplanted to an unknown continent, where by a strange twist of history it has become the constitutional bulwark of the public against the executive.

It has been suggested that Louis the Pious did not invent this, and that there was some precedent for the device as early as the Theodosian code (438), but the argument here is not quite so convincing—at least to Romanists, who are rather loath to admit the paternity of the jury. But from Louis the Pious onwards the evidence is clear enough, until the failure of the line of Charlemagne, when we come to a very obscure period,—the darkest moment of the Dark Ages,—and it was here that Brunner had to admit that there was a gap in his evidence. This gap has been filled to a great extent by the discoveries of Professor Haskins, who has confirmed Brunner's theory that the institution was carried over from the crumbling Empire of the Carolingians to the new Duchy of Normandy, and that the dukes used it there in much the same way as the emperors had before them.

So far the jury has been used by the government only as a particularly drastic means of establishing its own rights. This indicates some dissatisfaction with existing methods of proof, and it is clear that this dissatisfaction was shared by litigants as well, for the next stage in the history shows us private persons seeking as a favor from the duke or the King the privilege of having their rights ascertained by means of an "inquisition," as the institution was then called.

Henry I while he was Duke of Normandy occasionally bestowed the privilege of trial by inquisition (or jury) upon a favored church, such as Bayeux; Duke Geoffrey carried the process a step further and by means of an enactment, called an assize, made trial by inquisition the general method for all important litigation of a civil character. Geoffrey's son, Henry II, when he became King of England, adopted the same policy, and by a series of enactments, likewise called assizes, threw open trial by inquisition to the whole public, who could choose between half a dozen different procedures. From this time onwards the word "assize" takes several new meanings; it began by signifying a

solemn session of a council or a court, and soon came to mean an enactment made at such a meeting; among the most important of these assizes were those establishing trial by inquisition, and so it soon became customary to describe the inquisition of twelve men as an assize, while the various procedures leading up to this form of trial (which we should now call forms of action) were likewise called assizes. Finally, travelling justices were established in the thirteenth century in order to try these assizes more speedily, and these justices were naturally called justices of assize, and their sessions in the provinces were called the assizes.

All of this history (with the exception of the Law of Wantage) has therefore been concerned with the use of the inquisition as a means of trying royal rights, and later, by royal favor, the rights of litigants who have been fortunate enough to acquire the privilege, and finally its extension to everybody who proceeds through certain procedures called assizes—whose nature we shall discuss more fully in treating of the forms of action. Nothing, so far, has been said of the jury in criminal trials, and to this aspect of the question we must now turn.

Very soon after the Norman Conquest the inquisition appears in England as an administrative device for obtaining all sorts of information useful to the government from an unwilling populace. The officers of William the Conqueror were told to—

> "enquire by the oath of the sheriff and of all the barons and of their Frenchmen, and of all the hundred, of the priest, of the reeve, and of six villeins of every vill, what is the name of the manor, who held it in the time of King Edward, who now, how many hides, how many plows, —how many men, how many villeins, . . . how much it was worth and how much now; and all this at three times, the time of King Edward, the time when King William gave it, and now"—

and the answers were collected in *Domesday Book*. The Constitutions of Clarendon which settled the controversy of Church and State in 1164 recount that—

> "This record or recognition was made in the year 1164 in the presence of the King concerning a part of the customs and liberties of his ancestors which ought to be held and observed in the realm. And by reason of the dissensions and discords which have arisen between the clergy and the King's justices and barons concerning his dignities and customs, this recognition was made before the archbishop and bishops and clergy, and the earls, barons and nobles of the realm."

Here we have the principle of the inquisition used to ascertain even such vague matters as the customary political relations between Church and State. Upon occasion we find privileged litigants having their private rights tried by inquisition as a royal favor.[1] The greatest extension of the principle, however, was possible in the sphere of local government. A great deal of information of value to the King's officers could be obtained by compelling the inhabitants of a small community to answer the sheriff's questions, to inform against evil doers, to disclose mysterious crimes, and to tell of their suspicions. Here we come to royal rights which are not matters of property or custom, but rather possible sources of jurisdiction, and therefore of profit. An inquisition, vill by vill, had established the enormous tax-return called *Domesday Book*, but the inquiry into crime and criminals was also a matter of deep concern to the Crown, not merely as a matter of public policy but also as a source of revenue, for criminal jurisdiction with its fines and forfeitures was always lucrative. By this means the transition was effected, and in the Assize of Clarendon (1166) we find the establishment of a definite system of inquisitions as part of the machinery of criminal justice.

"First the aforesaid King Henry established by the council of all his barons for the maintenance of peace and justice, that inquiry shall be made in every county and in every hundred by the twelve most lawful men of the hundred and by the four most lawful men of every vill, upon oath that they shall speak the truth, whether in their hundred or vill there be any man who is accused or believed to be a robber, murderer, thief, or a receiver of robbers, murderers or thieves since the King's accession. And this the justices and sheriffs shall enquire before themselves.

"And he who shall be found, by the oath of the aforesaid, accused or believed to be a robber, murderer, thief, or a receiver of such since the King's accession shall be taken and put to the ordeal of water and made to swear that he was no robber, murderer, thief, or receiver of such up to the value of five shillings, as far as he knows, since the King's accession. . . .

"And when a robber, murderer, thief or receiver of such is captured as a result of the oath, the sheriff shall send to the nearest justice (if there are no justices shortly visiting the county wherein he was captured) by an intelligent man saying that he has captured so many men. And the justices shall reply telling the sheriff where the prisoners are to be brought before them. And the sheriff shall bring them before the justices together with two lawful men from the hundred and the vill

1 For an example see Pound and Plucknett, *Readings*, 141, 142.

where they were captured to bring the record of the county and the hundred as to why they were captured; and there they shall make their law before the justices.

"And if anyone is captured in possession of stolen or robbed goods and is of bad repute and can produce no testimony of public purchase nor a warrantor of title he shall not make his law. And if the goods were not publicly acquired he shall go to the water because they were found in his possession.

"And if anyone confesses before the lawful men of a hundred robbery, murder, theft or the receiving of such, and wants to deny it afterwards, he shall not make his law.

"The lord King also wishes that those who make their law and clear themselves shall, nevertheless, forswear the King's land if they are of bad renown and publicly and evilly reputed by the testimony of many lawful men, and cross the sea within eight days unless detained by the weather, and with the first favorable wind they shall cross the sea and never come back to England save by the King's permission, and shall be outlawed, and if they come back shall be captured as outlaws."

A thorough understanding of this document will show the difficulties which confronted the government in the administration of criminal justice. The presenting jury from every hundred would very soon provide the royal officers with a goodly number of suspicious characters. But suspicion is not proof, and the presentment by the hundred, like its modern descendant, indictment by grand jury, is merely an accusation and not a conviction. Having found the suspects, how is the question of their guilt or innocence to be determined? The document we have just quoted mentions two methods, "making one's law" and "going to the water." We must now for a moment describe these and one or two other methods of trial then in use, for it was the limitations and uncertainties of the ancient methods which led to the development of the modern petty jury.

The most ancient of these was the ordeal, which took a variety of different forms. Its origin must date from before the introduction of Christianity, but the practice was so deep-rooted that the Church, in this as in other cases, felt bound to adopt it. In consequence we find the ordeal surrounded by Christian ceremonies which must, no doubt, have added considerably to its moral effectiveness—and perhaps even to its practical value as a psychological test of truth-telling. Of the several forms of ordeal in use the ordeal of hot iron was that most common for freemen. It was administered at the most solemn moment of the Mass; a

special ritual was prescribed in the old service books telling us how the heated iron was to be carried by the accused through a distance of nine feet; then "the hand was sealed and kept under seal for three nights and afterwards the bandages removed. If it is clean, God be praised; but if unhealthy matter is found where the iron was held he shall be deemed guilty and unclean." [1] Another variant was the ordeal of boiling water, where the accused had to plunge his hand into a bowl of boiling water and take out a stone; his guilt or innocence was ascertained by inspecting his hand after three days. The ordeal of cold water was more often applied to the unfree. The accused was solemnly exhorted by the priest during Mass to confess his guilt if he were guilty; if he persisted in maintaining his innocence then—

"let the hands of the accused be bound together under the bent knees after the manner of a man who is playing the game of *Champ-estroit*. Then he shall be bound around the loins with a rope strong enough to hold him; and in the rope will be made a knot at the distance of the length of his hair; and so he shall be let down gently into the water so as not to make a splash. If he sinks down to the knot he shall be drawn up saved; otherwise let him be adjudged a guilty man by the spectators." [2]

Still another variety of ordeal was that of the cursed morsel. This consisted in making the accused swallow a piece of food in which was concealed a feather or such like; if he was successful, he was innocent, but if he choked he was guilty. Countless varieties of ordeal are still in use in different parts of the world among primitive tribes. The "wager of law" which we have just mentioned can hardly be described as an ordeal, for its principle is much more rational. The party who was called upon to make his law had to find a number of people, twelve or some other number fixed by the court according to circumstances, and then take a solemn oath that he was innocent. His companions, or "compurgators" as they were called, then swore that the oath which he had taken was clean. In other words, the court calls upon the accused to produce a specified number of people (occasionally from a particular class or even from the names on a given list) who are prepared to swear that in their opinion his oath is trust-

[1] This and some other forms are translated in Sayre, *Cases on Criminal Law*, 28–32.

[2] For a contemporary drawing of this proceeding, see Sayre, 29.

worthy. They do not swear to the facts of the case, but merely to their judgment that the accused is a credible person. Wager of law, therefore, reduces itself to a character test; in the earlier period when there were strong religious sanctions surrounding the oath it is clear that a disreputable person would have difficulty in finding compurgators. This form of trial lasted a very long time. In actions of debt and detinue it was theoretically possible down to the nineteenth century. The Church used it considerably, and it survived the Reformation under the title of "Canonical Purgation." Opinion as to its value seems always to have been divided. The passage we have quoted from the Assize of Clarendon [1] makes it clear that the Crown had little respect for it, at least as a defence to petty criminal charges. In civil matters, however, there are signs that it had a place; contemporaries seem to have regarded it as superior in some cases to witness proof.[2] The citizens of London as late as 1364 obtained a statute preserving their right to wage law as a defence to debts which were claimed on the evidence of a merchant's books—it is significant that a mercantile community should consider compurgation successfully performed as more weighty evidence than a merchant's accounts.[3]

One other method of proof was one introduced into England by the Normans, and this was trial by battle. In civil cases it was not fought between the parties themselves, but between their respective champions. The ancient formula suggests that the champion was originally a witness who was also a tenant bound by homage to defend his lord's title, and that a judicial duel between contradictory witnesses was allowed to decide the rights of the parties. The champion's regular oath (which soon became a matter of mere form)[4] stated that his father on his deathbed had informed him that the plaintiff had the right which was then in dispute, and charged him to maintain that right with all his power. We have already mentioned that when the county

1 Above, p. 101.

2 Esmein, *Histoire du Droit Francais* (ed. Génestal) 91, 92.

3 Statute 38 Edw. III, stat. 1, c. 5. (Compare 9 Plymouth Colonial Records, 49.)

4 "Concerning the oath of champions, forasmuch as the demandant's champion is frequently perjured in swearing that he or his father saw the seisin of his lord (or the lord's ancestor) and that his father ordered him to defend it, it is provided that henceforth the champion of the demandant shall not be compelled to swear to this: but the oath shall be retained in all other respects."—Statute of Westminster I, c. 41 (1275).

court recorded its proceedings for the purpose of review by the Court of Common Pleas, a party might dispute the accuracy of the record and compel the county to defend it by battle. We very soon find from the rolls that there was a professional band of champions who undertook business all over the country; courts would arrange the dates of battle so that the champions could fit in their engagements conveniently. Some very great landowners, such as the larger monasteries, were so constantly involved in litigation that they maintained their own full-time champions.[1] But in criminal cases battle was a much more serious affair. It lay when a private person brought a criminal charge against another, and was fought by the accuser and accused in person. It was deadly; if the defeated defendant was not already slain in the battle he was immediately hanged on the gallows which stood ready. As it only lay in these private proceedings (called "appeals of felony") there was no question of trial by battle where the accused had been indicted or where the Crown was a party.

These, then, were the methods of proof available to the justices when confronted by the crowd of suspects brought before them through the presentment of the juries of the hundreds and vills.[2] As for those whose guilt was beyond question, no difficulty arose. They were dealt with by very summary methods (which can hardly be called a trial) immediately upon their capture.

It will be seen that there was very little choice. A criminal could be tried by battle only at the suit of a private prosecutor, and not at suit of the Crown; as for compurgation, the Assize of Clarendon tells us that a successful defence by this means was not very convincing, and even imposes punishment upon those who thereby clear themselves, if they are of bad character generally. Only the ordeal remained, and this was no doubt the general method of trial at the end of the twelfth century—tempered perhaps by the discretion of the justices who may have allowed their private judgment upon the guilt or innocence of the accused to overrule the result of the ordeal if it turned out obviously unsatisfactory.

1 Trial by battle in civil actions was so popular that even so late as 1376 the Commons in Parliament prayed that it might be allowed in the Court of Exchequer. 3 Rot. Parl. 337.

2 For full contemporary descriptions of these archaic modes of trial, see Pound and Plucknett, *Readings*, 134–141.

The whole matter of criminal trials, which, as we have seen, had long been unsatisfactory, was brought to a crisis by Pope Innocent III who in the Fourth Lateran Council (1215) forbade clergy from performing any religious ceremonies in connection with ordeals. This, of course, robbed the ordeal of all religious sanction and to all intents and purposes abolished it as a regular means of trial (although it seems that in some localities it still persisted with the connivance of disobedient clergy). Henry III's government immediately recognized the decree, and appreciated the extremely difficult position which it created, for the only remaining method of trying suspected criminals had been forbidden by the Church. A writ to the Justices in Eyre was therefore issued in 1219 giving temporary instructions how to proceed until further order was taken. It reads as follows:

"The King to his beloved and faithful . . . Justices Itinerant . . . greeting: Because it was in doubt and not definitely settled before the beginning of your eyre, with what trial those are to be judged who are accused of robbery, murder, arson, and similar crimes, since the trial by fire and water (the ordeal) has been prohibited by the Roman Church, it has been provided by our Council that, at present, in this eyre of yours, it shall be done thus with those accused of excesses of this kind; to wit, that those who are accused of the aforesaid greater crimes, and of whom suspicion is held that they are guilty of that whereof they are accused, of whom also, in case they were permitted to abjure the realm, there would still be suspicion that afterwards they would do evil, they shall be kept in our prison and safeguarded, yet so that they do not incur danger of life or limb on our account. But those who are accused of medium crimes, and to whom would be assigned the ordeal by fire or water if it had not been prohibited, and of whom, if they should abjure the realm there would be no suspicion of their doing evil afterwards, they may abjure our realm. But those who are accused of lesser crimes, and of whom there would be no suspicion of evil, let them find safe and sure pledges of fidelity and of keeping our peace, and then they may be released in our land. . . . We have left to your discretion the observance of this aforesaid order . . . according to your own discretion and conscience."[1]

From this writ it will be seen that the justices were to be guided entirely by suspicion, and were to reach their conclusions as to the reasonableness of that suspicion solely from their own discretion. A rough scale was recommended whereby those suspected of greater crimes were to be imprisoned instead of suffering judg-

[1] This translation is made from the text printed by Wells, *Origin of the Petty Jury*, 27 Law Quarterly Review, 252.

ment of life or limb (as would have been the case if they could have been regularly convicted); those suspected of medium crimes were to be banished; lesser crimes were leniently treated, the suspect being simply bound over. This was only meant to be temporary, and obviously could be nothing more, for the whole compromise was based upon the fallacy that a half-proof of guilt was equivalent to a proof of half-guilt. The Crown, however, seems never to have given any further guidance to its justices, at least as far as the available sources show. The Church had abolished the one lawful means of trial, and the only suggestion which the Crown had made was a false and unworkable compromise. The matter was therefore left to be solved by a method typical of English law—the justices were to make such experiments as they saw fit and gradually feel their way towards a solution. The various devices which they tried have been traced with some success through the rolls. Even before the crisis of 1219 occasional cases are to be found of the presentment juries giving what has been called a "medial judgment," that is to say, declaring what ordeal ought to be assigned—or sometimes giving a verdict upon the issue whether the indictment was "maliciously procured out of hate and spite" (*de odio et atia*). This issue was very frequently introduced, and in fact was really conclusive as to the main question. This was, moreover, the first step in the direction of a criminal trial by jury. After some years of hesitation it was realized that if a jury could by its verdict declare that an indictment was maliciously procured, there was no valid reason why it should not answer the straight question whether the prisoner was guilty or innocent. We soon find that this last step was taken. It must be remembered that all these proceedings took place in the course of an eyre in the early years of the thirteenth century, when that institution was in its most vigorous period. On such an occasion the King's justices had before them a very considerable number of jurors making presentments from vills and hundreds, from boroughs and the county itself. A presentment would be made by the representatives of one of these vills or hundreds, and in order to get a final verdict on the guilt or innocence of the prisoner the justices hit upon the device of associating with the presenting jury the juries of the four neighboring vills; "afforced" in this way, the larger body then proceeded

to answer the question whether the prisoner was guilty of the crime for which he had been indicted. At first the judges exercised a good deal of discretion in making up the trial jury; at times they did not even trouble to add any further jurors at all, but merely inquired of the presenting jury whether the prisoner was guilty. At other times we find a very large body of jurors associated together as a trial jury—in one case we even find a jury of eighty-four persons. It seems, however, that in the early stages such a large body of jurors did not sit together, but was examined unit by unit, the verdict of the representatives from each of the different communities being taken separately. From the numerous verdicts so obtained (sometimes contradictory and sometimes expressed in terms of hesitation) the court formed its own conclusion and proceeded to judgment accordingly.

The great defect of this system, as prisoners no doubt pointed out, was that to some extent at least the accused was being tried by his accusers. The Crown did not feel too confident either; the petty jury in criminal trials was a makeshift expedient and an innovation. Under the old law a prisoner could undoubtedly have been compelled to submit to the ordeal and to abide by any construction which the justices might place upon the outcome of it; but was it reasonable to compel a man to submit to trial by jury? Even the Crown felt that this was unreasonable, and it soon became customary to put the astonishing question to the prisoner whether he consented to trial by jury. If he refused to say the necessary words and "put himself upon the country" it seemed as though nothing further could be done. If such a prisoner could have spoken the language of modern constitutional law he would very likely have raised a doubt whether trial by jury in criminal cases was due process of law, for the time-honored methods of trial were the ordeals, and the petty jury was a newfound device of very recent origin. Towards the close of the century the Crown felt strong enough to impose jury trial by sheer force, and the Statute of Westminster I, c. 12 (1275), provided—

"that notorious felons who are openly of evil fame and who refuse to put themselves upon inquests of felony at the suit of the King before his justices, shall be remanded to a hard and strong prison as befits those who refuse to abide by the common law of the land; but this is not to be understood of persons who are taken upon light suspicion."

This statute begins with a threat and concludes with an argument; could there be any better indication of the government's difficulty in imposing trial by jury? As is well known, the words "*prison forte et dure*" by some unaccountable means became transformed in common speech into "*peine forte et dure*," and finally into a form of torture which, as the middle ages proceeded, took the barbarous form of placing the accused between two boards and piling weights upon him until he accepted trial by jury or expired. Felons whose guilt was obvious sometimes heroically chose to die in this manner rather than plead, be convicted and hanged, for a prisoner who died under *peine forte et dure* had never been tried and never convicted, and consequently his goods and chattels could not be forfeited to the Crown. It was abolished in 1772.[1]

In the middle of the thirteenth century, moreover, the justices adopted a simpler procedure. Instead of taking separate verdicts from numerous vills and hundreds, they selected a petty jury of twelve from among the numerous jurors present in court, and took the verdict of these twelve. It regularly happened that at least some of these twelve had also been members of the presenting jury, for it must be remembered that the whole principle of jury trial was to get information useful to the Crown from those people most likely to have it—the principle of the ancient inquisition. As late as 1342 the court refused to allow a petty juryman to be challenged on the ground that he had been a member of the presenting jury: "if the indictors be not there it is not good for the King," it was said.[2] Not until 1352 did a statute allow challenge to be made on this ground.[3]

From this it will be seen that in its origin the jury is of a representative character; the basis of its composition in the early days, when its structure was determined by the vill or the hundred, was clearly the intention to make it representative of the community. Its object was either to present the suspicions of the countryside, or, in the case of a petty jury, to express its final opinion. Its character was certainly not that of witnesses; it was indeed bound to speak of its own knowledge, but that does not necessarily mean

[1] For some curious details see Thayer, *Preliminary Treatise on Evidence*, 74.

[2] *Y. B. 14–15 Edward III*, 260, 261.

[3] 25 Edward III, Stat. 5, c. 3.

that its knowledge must be as strictly first-hand as that of a modern witness. There is no trace of a requirement that jurymen should themselves have witnessed the events in question. Bracton has introduced some confusion at this point. He wanted to write a big book and had a tendency to fill in the gaps of native English law from other sources, and so there is always difficulty in distinguishing between Bracton as the expositor of contemporary practice, and Bracton the idealizer and scholar of foreign learning. In one passage[1] he gives us a list of challenges which can be used against jurymen, and seems to have imported the exceptions against witnesses which were available in canon law, and used them as challenges against jurors. However this may be, he is surely describing contemporary practice faithfully when he shows us how the justices will help the jury to express an uncertain verdict in more satisfactory form, adding: "If the jurors are altogether ignorant about the fact and know nothing concerning the truth, let there be associated with them others who do know the truth. But if even thus the truth cannot be known, then it will be requisite to speak from belief and conscience at least." Clearly, therefore, the jury spoke as representative of the countryside rather than as a body of witnesses.

Bracton seems to be fairly satisfied with the jury as an institution, but other writers of almost the same date confirm the impression conveyed by the statute which we have just quoted. The *Mirror of Justices,* which was a vigorous criticism of the administration of justice written about 1290, contains a violent attack on the jury.[2] In France also, where the jury for a time took root, there were protests against it as oppressive.[3]

From the reign of Edward I onwards the function of the jury is slowly being judicially defined; questions of law begin to be separated from questions of fact,[4] and gradually unanimity is required—although for some time there were doubts whether a verdict by eleven jurors was not sufficient, in which case the twelfth might be committed to prison.[5] In 1468 Fortescue gives

[1] Translated in Pound and Plucknett, *Readings*, 149.

[2] The passage is in Pound and Plucknett, *Readings*, 154.

[3] See the French political song, *loc. cit.*

[4] For an interesting early case, see *ibid.*, 155.

[5] See the discussion in 41 Lib. Ass. 11 (translated in Pound and Plucknett, *Readings*, 155, 156).

us a picture of jury trial which is to all intents and purposes in modern form. By this date he is able to regard the jury as a body of impartial men who come into court with an open mind; instead of finding the verdict out of their own knowledge of the events, the parties or their counsel in open court present their evidence to the jury, and witnesses are examined upon oath.[1] Even as Fortescue wrote, however, jury trial, both civil and criminal, had already entered upon its decline, and there were numerous complaints of the corruption and partiality of jurors. It became more and more necessary to devise means for revising and controlling verdicts.

The only ancient method available was by attaint. This consisted in summoning a jury of twenty-four, and the proceedings were not merely a reconsideration of the facts in dispute, but also a criminal trial of the first jury for perjury. This was only logical at a time when every jury spoke out of its own knowledge of the facts involved in the case. Their function was to tell upon oath the facts which they knew; it was not their duty to act as impartial judges of evidence produced before them. If such jurymen returned a verdict which was demonstrably false, and in spite of their own better knowledge of the facts, then it was obvious that they had committed perjury and deserved the terrible punishment which the law provided for attainted juries. "All of the first jury shall be committed to the King's prison, their goods shall be confiscated, their possessions seized into the King's hands, their habitations and houses shall be pulled down, their woodland shall be felled, their meadows shall be plowed up and they themselves forever thenceforward be esteemed in the eye of the law infamous."[2] As the character of the jury slowly changed the logic of the action of attaint became less apparent. As the middle ages proceed the custom grows of assisting the jury by producing evidence in court in their presence. From quite an early date the witnesses named in a deed, if still living, were summoned to sit with the jury; and gradually, first in one case and then in another, it became customary to examine other witnesses in the presence of the jury. As a result the jury speaks less and less out of its own knowledge and becomes instead a judge of the evi-

1 *Ibid.*, 156–159.

2 Fortescue, *De Landibus Legum Anglie* (c. 1468), chaps. 25, 26 (translated in Pound and Plucknett, *Readings*, 156–159).

dence placed before it. The situation in respect to attaint thus becomes very different. It is true that a jury may return an erroneous verdict as a result of inadequate or inaccurate evidence, or a misunderstanding of the true import of the evidence adduced; but such an error of judgment in making a wrong deduction from evidence which may have been conflicting, insufficient or improperly presented is surely not sufficient reason for the severe penalty provided in the old action of attaint. It is no longer a question (at least in many cases) of deliberate perjury, but only of a more or less excusable error of judgment. It is only natural to find, therefore, that the action of attaint falls into disuse; juries of twenty-four were clearly unwilling to subject fellow jurymen to the savage sentence of attaint unless they felt satisfied that there had been really bad perjury, and in this they maintained the ancient principle of the attaint procedure. This, however, did not help the situation. The more the jury becomes a judge of facts which parties attempt to prove before them, the more room there is for honest mistake, more especially as there is practically no trace of a law of evidence at this period. In short, there was an increasing need of some machinery for revising the verdicts of petty juries—more especially in civil actions, which always received in the middle ages more careful attention than criminal matters. Occasionally we find an appeal to Parliament where even an attainting jury was alleged to be prejudiced.[1] The legislature extended the attaint procedure from the assizes (to which it was originally confined) to other forms of action; a trial by jury in the forms of action called assizes had always been compulsory and attaint had been possible from a very early date as a compensating safeguard, but in other actions, where parties voluntarily (in form at least) put themselves upon a jury, the theory was that since they had chosen this form of trial they were not entitled to any relief if it turned out unsatisfactorily. But extending attaint first to one action and then to another, and finally in 1360 to every action tried by jury, did little to relieve the situation.[2] In London local legislation wisely reduced the penalty

[1] 2 Paston Letters (1904), 231.

[2] 34 Edward III, c. 7; in 1531 the Statute 23 Henry VIII, c. 3 (in Pound and Plucknett, *Readings*, 160–163), extended the penalties of attaint to a party who relied on a false verdict.

upon attaint.[1] But as for the common law Queen Elizabeth's Secretary of State, Sir Thomas Smith, wrote:[2]

"Attaints be verie seldome put in use, partly because the gentlemen will not meete to slaunder and deface the honest yeomen their neighbours, so that of a long time they had rather paie a mean fine than to appeare and make the enquest. And in the meane time they will intreat so much as in them lyeth the parties to come to some composition and agreement among themselves, as lightly they do, except either the corruption of the enquest be too evident, or the one partie is too obstinate and headstrong. And if the gentlemen do appeare, gladlyer they will confirme the first sentence, for the causes which I have saide, than go against it. But if the corruption be too much evident, they will not sticke to attaint the first enquest: yet after the gentlemen have attainted the yeomen, if before the sentence be given by the Judge (which ordinarily for a time is differred) the parties be agreed, or one of them be dead, the attaint ceaseth."

In the sixteenth century examples are to be found of various prerogative courts undertaking to punish jurymen who found verdicts manifestly against the evidence. In an age when political trials were becoming more frequent, it became a serious matter that verdicts could be set aside and jurors punished in courts which were really a disguised form of the Council. In Crompton's treatise on the *Jurisdiction of Courts* (1594) we read:

"Note that the London jury which acquitted Sir Nicholas Throgmorton, Knight, about the first year of Queen Mary, of high treason, was called into the Star Chamber in October, 1544, forasmuch as the matter was held to have been sufficiently proved against him; and eight of them were there fined in great sums, at least five hundred pounds each, and remanded back to prison to dwell there until further order were taken for their punishment. The other four were released, because they submitted and confessed that they had offended in not considering the truth of the matter.

"See also eleven jurymen who acquitted one Hodie of felony before Sir Roger Manwood, Chief Baron, on circuit in Sommersetshire, against obvious evidence, were fined in the Star Chamber and made to wear papers in Westminster Hall about 1580; and I saw them.

"Note that one G. wrote a letter to a juryman who was about to sit on a case between Lane and O. D., requesting him to follow his conscience according to the evidence; he was fined here twenty pounds because it was not his business, about 1585. Note this, that one ought not to meddle with any matter pending in suit which is not one's own business."[3]

1 Thayer, *On Evidence*, 151.

2 *De Republica Anglorum* (ed. Alston) 111.

3 Crompton, f. 32 b.

A very famous case on this matter was *Bushel's Case*[1] in 1670, where Chief Justice Vaughan in his judgment defined the position and duties of the jury. Although he retains the ancient view that a jury may depend upon its own knowledge, yet he gives a larger place to their independence. He insisted upon the ancient law; in his opinion the jury was not bound to follow the direction of the court, for the very good reason that if they return a wrong verdict it is the jurors who are punished by attaint, and not the judge who directed it. Every jury returns a verdict with the shadow of attaint overhanging it and this is ample sanction. Acting, therefore, under so great a peril, the jury must be left completely free from directions by the bench and from any subsequent punishment in Star Chamber or elsewhere, with the sole exception of the ancient proceeding of attaint. In other words, there was just enough of the doctrine of attaint left to enable the court to say that there was adequate means of dealing with a dishonest jury, and therefore of declaring in general terms the jury's right to independence. The judgment of Vaughan was very ingenious in its combination of antiquarianism and logic. Under the circumstances these were no doubt proper weapons in the defence of juries against political interference. But Vaughan knew, as well as everybody else, that for practical purposes attaint was obsolete, and that his judgment therefore amounted to a declaration of the irresponsibility of the jury. However useful this might have been in certain types of political trial, it was obvious that it worked hardship in private litigation. The courts were well aware of this, and were already at work even before *Bushel's Case* in search of some means of setting aside obviously unsatisfactory verdicts.

They began to devise rules under which a new trial could be ordered. The mediæval law on the subject of new trials was not very promising. The only early grounds which they admitted were misconduct of the jurymen, such as eating and drinking before returning their verdict, and even then the verdict was not necessarily set aside.[2] During the Commonwealth there was the striking case of *Wood* v. *Gunston* in 1655, when the Upper Bench allowed a motion for a new trial when a jury had awarded un-

[1] Vaughan, 135; extracts in Pound and Plucknett, *Readings*, 164–167.

[2] See 1 Dyer, 37 b, and 2 Dyer, 218 a (both in Pound and Plucknett, *Readings*, 160).

reasonably high damages in an action for slander, against the direction of the court.[1] There was certainly no authority for this; Coke had declared in 1615 that "jurors were chancellors" in the matter of assessing damages, and entitled to use an uncontrolled discretion.[2] This Commonwealth precedent of course carried no weight after the Restoration, and it was a long time before juries lost their arbitrary power over damages.[3] For a time the courts took refuge in the distinction between trials at *nisi prius* and trials at bar; the former being regarded as less solemn and therefore liable to be set aside; but Lord Holt in *Argent* v. *Darrell* (1699)[4] declared that "there never was a new trial after a trial at bar in ejectment." By 1757 Lord Mansfield was able to say in *Bright* v. *Eynon*[5] that new trials were frequently granted, although there is no trace of it in the books, because the old reports do not give any account of decisions upon motions. This fortunate omission no doubt assisted matters greatly, and it soon became easy to believe that the practice of granting new trials was established.[6] Thus was a revolutionary reform quietly effected without leaving many traces in the books; as we have seen, the work was half done by 1699, and declared to be complete in 1757. It need hardly be said that all through mediæval times down to our own day, a jury was always at liberty to find a special verdict by stating the facts (often at great length) as it found them, and leaving it to the court to determine whether this verdict was in law a determination for the plaintiff or the defendant.

From all this it is clear (in spite of Lord Vaughan's judgment in *Bushel's Case*) that for practical purposes the jury depended very largely, if not entirely, upon the evidence placed before it in court. This was certainly true of the seventeenth century and probably true of a large part of the sixteenth century. It was this circumstance which made necessary the development of a law of evidence.

Into the complicated history of this subject we cannot enter here. A good deal of excellent work has been done upon it by

1 Style, 466; Pound and Plucknett, *Readings*, 166, 434, 435.
2 *Hixt* v. *Goats*, 1 Rolle, 257; Pound and Plucknett, *Readings*, 167.
3 See Pound and Plucknett, *Readings*, 168.
4 Salk. 648; Thayer, *On Evidence*, 171.
5 1 Burr. 390.
6 Note that the lack of reported decisions on a point is sometimes an advantage.

James Bradley Thayer in his *Preliminary Treatise on Evidence*, and more recently by Dean Wigmore in his monumental *Treatise on the Law of Evidence*[1] which has served as the basis for the treatment of the subject by Holdsworth in the ninth volume of his *History of English Law*. All these works are easily accessible. There is room for a comparative study of the development of the principles of evidence in different systems. An interesting essay in this direction from the pen of Sir Courtenay Ilbert is published in the *Encyclopædia Britannica* (1911) in the article "Evidence."[2] Quite recently a valuable collection of continental material has become available in the *History of Continental Civil Procedure* translated by Professor Millar from the work of Englemann and others.

We have now traced in brief the history of local institutions in their judicial aspect, together with the points of contact between them and the central government. It is at these points of contact that we first find signs of the development of the jury. For quite a long time the machinery of the jury was the regular means of communication between royal officials and the local public. Nor was this merely in judicial affairs; administration, police and fiscal matters, were all likely to be conducted through some form or other of the jury. From these beginnings as an administrative machine for extorting truth on any matter of royal concern from a reluctant countryside, the jury soon acquired a representative character. This idea of the jury representing the public of a particular locality had enormous consequences in an age when representative institutions were rapidly developing. From the presenting jury of the hundred and the county it was a short step to the House of Commons in its most primitive aspect, which at first consisted of representatives from such local communities as the county and the borough, all sitting together at the King's summons to hear and to do what he should command. An early meeting of Parliament must have resembled to some extent an enormous eyre; all the lords and notables of the land together with representatives from the local communities met together in the presence of the King or his justices for the transaction of all sorts of business, judicial, administrative and fiscal. The seven-

[1] For a few extracts from the historical portion, see Pound and Plucknett, *Readings*, 168–177.

[2] For some quotations, see *ibid.*, 170 n. 1.

teenth century pamphleteers had some grounds for calling the Commons the "Grand Inquest of the Nation." As for the jury, this representative aspect served as the foundation for its later irresponsibility. This created a situation of exceptional difficulty; on the one hand ancient history and current convenience both insisted upon the necessity of the jury's independence. A representative institution, be it a jury, a parliament or a congress, must necessarily have certain immunities if it is to do its duty. On the other hand, slowly changing practice was altering the character of the jury by transforming it into a judge of facts; in this aspect of its work irresponsibility was out of place. The decisions of the judges themselves on matters of law were subject to proceedings in error; why, then, should the decisions of a jury on matters of fact be completely irreversible? Both functions were essentially the same, that is to say, an exercise of judgment, as Vaughan was keen enough to see in *Bushel's Case*. It was inevitable therefore that the practice should arise of setting aside verdicts for erroneous conclusions as to facts, in the same way as decisions upon law could be reversed if they were erroneous. As far as purely private litigation is concerned, this was inevitable and entirely desirable. The difficulty arose in trials of a political character, for here the jury retains its old representative character to a marked degree, and there has been a natural feeling that here if anywhere the jury's independence ought to be most jealously guarded. A remarkable illustration of the feeling that a jury is likely to be more independent (or at least more representative of national feeling) than a judge is to be seen in Fox's Libel Act of 1792 which reduced the position of the bench in libel cases (which were frequently apt to have a political character) to a minimum by allowing the jury not only to find the facts, but also to declare whether those facts in law amounted to a libel. Lord Thurlow led the opposition against the bill in the House of Lords, and took the opinion of the judges on the legal points involved. The judges reported adversely to the principle of the bill, but nevertheless it passed:

"And thus, to the immortal honour of Mr. Fox, Mr. Erskine, Lord Camden, and the legislature, was passed the famous Libel Bill of 1792, in opposition to all the judges and chief legal authorities of the time. Being in the form of a declaratory law, it was in effect a reversal of the decisions of the judges by the High Court of Parliament. Its success

was undoubted for all the purposes for which it was designed. While it maintained the rights of juries and secured to the subject a fair trial by his peers, it introduced no uncertainty in the law, nor dangerous indulgence to criminals. On the contrary, it was acknowledged that Government was better protected from unjust attacks when juries were no longer sensitive to privileges withheld, and jealous of the bench which was usurping them." [1]

The principle of this act has been generally adopted in America. It is, of course, true that when a jury is conscious of its representative character,—in other words, feels itself swayed by political feeling,—there is a chance that it may be wrong instead of right; governments are not always to blame, and popular feeling sometimes makes mistakes. But in either of these two cases the jury is apt to have the last word. For this there is no remedy. A policy of checks and balances can only be pursued up to a certain point; there must always be, somewhere, a power from whose decision there is no appeal; sometimes this is a judge, sometimes a jury, and sometimes a representative body, and the responsibility which lies upon them is only made the more grave because it is moral and not legal.

After being something like an engine of oppression, the jury then gradually changed its character. An administrative device became in the fullness of time a part of the judicial system, and, adding to this its old representative character, finally grew into a cherished safeguard of liberty.

[1] 2 May, *Constitutional History*, 18.

CHAPTER V

THE CENTRAL COURTS

So far we have discussed the local courts, both communal and seignorial, and the contacts which took place between them and the royal authority, and particularly the most important of these contacts, the jury. It now remains to sketch the rise of the central courts at Westminster.

During the Anglo-Saxon age there was nothing which could be described as a central royal court, although there were certainly central royal institutions. Their formation is the product of two elements, the one being the royal household, and the other the national assembly. It is to the royal household that we must look for the origins of the administrative machinery of the Anglo-Saxon monarchy. The greatest household officers inevitably acquired political influence and took a part in public affairs. Similarly the group of clergy attached to the King's chapel naturally formed the nucleus of a secretariat which in time will be called the Chancery. It was only natural that the King should surround himself with men whose advice he valued, frequently placing them in high positions in the household. The household therefore consisted not merely of the King's domestic servants but also of men of an official class whose assistance was useful in the daily task of government. When there was added to them the body of King's clerks, there was all that was required for the day-to-day business of government. This system of household government survived long after the Anglo-Saxon times. The Norman kings systematized it; in the thirteenth century portions of it became separated from the household, and in the fourteenth century developed into independent offices of State closely resembling the modern civil service. But this machinery was still controlled by the household, and bitter constitutional struggles were constantly occurring as the nobility at large endeavored to curb the activities of the household officials. The Exchequer, for example, at a very early date, had achieved a completely independent existence, and yet to the

end of the fifteenth century the effective control of finance was in the hands of the household, working through the offices of the Wardrobe and the Chamber. So, too, the Chancery very soon became an independent office for the management of the Great Seal, and yet its policies were controlled either by the Council working through the Privy Seal Office, or else by an inner group of household officials (especially the chamberlain of the household) working through the Office of the Signet.[1] The effective power wielded by the holders of the signet can be seen by the rapid rise to importance of the Secretary who was its official custodian. In the sixteenth century he becomes a "Secretary of State," and at the present day English cabinet ministers are created by the delivery of the signets which are handed to them by the King himself as symbols of their office. The household, therefore, is not merely the original germ of our central institutions, but has continued all through the middle ages to occupy a central position of effective political control, even over those departments of State which in former times had separated from it.

The second element in the growth of these institutions may be described as that of the national assembly. The household was adequate enough for the ordinary daily business, but from time to time questions arose which required the advice of a large number of people representing different interests. The effective political public for a long time coincided with the small class of great nobles and great ecclesiastics. Matters of grave importance would naturally be discussed at a somewhat large meeting of the most notable men of the nation. There is no need to apply precise terms and definitions to such assemblies, or to seek for exact rules as to their competence. Still less is it appropriate to ask questions as to what matters must be done with the concurrence of such an assembly, and what matters could be done without it. There was nothing in the Anglo-Saxon age, or for a long time afterwards, which could be described as a body of public law. Conferring with the magnates of the realm was not a legal necessity, but a dictate of political prudence. It was only natural that the Crown should take counsel upon grave matters with those magnates whose co-operation was necessary if a policy was to be

[1] The struggle for the seals is described in Plucknett, *Place of the Council in the Fifteenth Century*, Transactions of the Royal Historical Society, 1918, pp. 176–183.

enforced. When we speak, therefore, of the national assembly under the Anglo-Saxon kings,—"Witan" as they called it,—we must not expect to describe its composition and powers as if it were a modern congress or parliament. There were certain persons who certainly expected to be summoned when important matters were on the table; the position of others was less definite and varied with circumstances; but in any case, it would be misleading to speak of anyone having a right to attend. On the contrary for many centuries attendance at assemblies and Parliaments was a burden rather than a privilege, and people considered themselves lucky if they could obtain the royal privilege of not being summoned to Parliaments. The national assembly, therefore, was not a body of fixed composition or definite powers. Sometimes it seems hardly larger than the household itself, while at others we find a very imposing array of nobles and prelates.

It is after the Norman Conquest that these things take a more definite form. The household continues to be the real political center, and beside it, or perhaps within it, there develops a small council consisting of clerks and minor officials who are continually at hand for the transaction of daily business. The national assembly, on the other hand, begins to take a different complexion. It was one of the main features of feudalism that a lord could demand counsel from his tenants, and that those tenants were legally bound to attend their lord upon demand and to sit as a court in order to give him advice, to pass legal judgment upon fellow tenants, and to grant financial and moral support to the lord. The old national assembly therefore became a court with comparatively definite powers, and a well-defined obligation of attendance. For the time being it is true that its business was principally what we may describe as feudal. But in the eleventh and twelfth centuries feudal matters were of first-rate importance. Feudal custom regulated the position of the Crown with respect to the great nobles, and therefore supplied the place of a body of public law. The King's Court, therefore, is not merely the Anglo-Saxon consultative assembly, but also a body entrusted with the power of applying such constitutional law as then existed. It was also a peculiarity of feudalism that these matters of public law—the prerogative of the Crown, the rights and duties of the baronage, the means of extraordinary taxation and so on

—were intimately connected with land. From this it resulted, first, that the King's Court had to pay special attention to the law of land upon which these public rights and duties were based, and secondly, that these matters of essentially public law came to be regarded from the point of view of private property law. Political rights and privileges, the powers of particular officers and the like were treated as if they were land—or at least incorporeal hereditaments, which mediæval law hardly distinguished from land. In this way there grew up the habit of regarding political and constitutional rights as sharing the specially sacred character of private property. As long as the common law controlled political thought, this attitude of mind persisted. No doubt there were grave disadvantages in the feudal view which treated governmental powers as private property—for one thing, they were apt to be regarded as private resources to be exploited to the limit; yet, on the other hand, the English Constitution and the common law itself owed a good deal of their stability and continuity to the fact that all the sanctity which attached to private property could be invoked to protect the liberty of the subject. It is only when the modern theory of the State appears after the Reformation and the Renaissance, that this point of view is theoretically attacked. This does not mean to say, of course, that the Crown never violated the rights of private liberty and property; as we shall see, more than once encroachments were made upon privileges which were the property rights of local magnates. Nevertheless, the theory was universally admitted, and in times of stress played an important rôle. As late as the fifteenth century many important questions of public law, such as the relations of Crown and Parliament, the theory of taxation, and so on, were discussed entirely from the point of view of a real property lawyer.[1] All this, therefore, was the direct result of the feudal character of the King's Court as it appears after the Conquest.

Before we discuss further the character and developments of the King's Court (which historians usually refer to by its old Latin style of the *Curia Regis*) it may be well to examine the various meanings of the word "court" or *"curia."* The original sense of the word is the rectangular open space around which the

[1] See above, p. 35.

mediæval house was built; the usual plan was that of a hollow square of buildings, the inside space of which was called the court. The colleges at Oxford and Cambridge are all built upon this plan, which was originally that of the ordinary dwelling house, and in Cambridge their interior spaces are still called courts. The next development is to extend the word "court" to the house itself, and many famous houses in England are still called courts—Hampton Court, for example. Then the word "court" can also be used of the household and personal attendants of a king or great noble. Upon certain festivals during the year kings and nobles were accustomed to gather around them a particularly large company, and this event, too, becomes known as a court. At Christmas and Easter the Anglo-Norman kings held courts of this character. The word was also applied to those assemblies at which attendance was compulsory as a feudal duty, and thence by a natural transition to any assembly for the purpose of transacting important public business; the Bank of England is governed by a court, and the Commonwealth of Massachusetts by a General Court. Finally, the word "court" is particularly used of such assemblies when they are engaged in judicial business. In mediæval times there is a chance that the word "court" may bear at the same time any of these different meanings singularly or in combination, and if mediæval institutions are to be understood properly, it must be remembered that a court might be at the same time legislative, judicial, deliberative and even festive.

The court of the Anglo-Norman kings consisted, therefore, of the Anglo-Saxon Witan which was essentially deliberative in character, radically transformed by the infusion of Norman ideas. There is a long and somewhat fruitless discussion as to whether the Norman *Curia Regis* is or is not the same institution as the Anglo-Saxon Witan; in this form the question can hardly be answered. It seems rather to have been the fact that the formless and indefinite Witan was so thoroughly transformed by the Norman kings that it is purely a matter of fancy whether one describes the product as a new institution, or as a modification of the old one.

There are cases to be found where the Witan under the Anglo-Saxon kings engaged upon quasi-judicial functions; it is per-

fectly clear, however, that the Witan did not entertain the ambition of becoming a national court. The whole spirit of Anglo-Saxon law made for the maintenance of local institutions, and more than once we find laws prohibiting parties to appeal to the King unless there has been a grave default of justice in the regular courts. When judicial matters do appear before the King and the Witan they are apt to be treated as political disputes requiring a political solution by negotiation, compromise and royal mediation, rather than a strictly judicial treatment. With the Norman Conquest we begin to find the transformation of the deliberative Witan into the judicial court. The transformation was, of course, slow, and even after the Conquest there are proceedings in the King's Court of the more ancient type. Still, the feudal idea of a court of tenants-in-chief was sufficient to supply the model of a supreme royal court, and it was from that model that the judicial system of the common law later developed.

It was a feature of mediæval life that the King and his court were constantly travelling through the length and breadth of the Kingdom, and that in the course of these journeys a general supervision would be effected over the conduct of royal officers, the working of local institutions, the collection of revenue and the redress of grievances. It was only natural that the idea should be extended, and that kings should send out some trusted officer to conduct similar progresses through the country for the same general purposes. Charlemagne in the early ninth century had developed a regular system of such *missi dominici,* and very soon after the Conquest we find a similar device in England. At the head of this traveling group of officials were the Justiciars—and it must be remembered that their title does not imply that their duties were primarily judicial, so much as that they were the direct personal representatives of the King. In this way the King's Court is enabled to be in several places at once; besides the principal body, which was always in the presence of the King himself, there might be several groups of officials touring the country as Justices in Eyre, as they soon came to be called. In this way the custom and practice of the King's court is made more familiar by being spread over the country, and by being brought into contact with local institutions. During the reign of Henry II these Eyres are very frequent, and Bracton and his

successors treat them as a separate judicial jurisdiction.[1] There can be no doubt that there was much important legislation effected (which is now entirely lost) by means of instructions to the justices as they set out upon their Eyre.

The King's Court, however, still remained constantly at work in his presence, and the development of the jurisdiction of the Eyre did not seriously diminish the powers exercisable in the King's Court proper. It soon became evident, however, that convenience required a certain amount of specialization within the *Curia Regis*. The curious thing about this is that these divisions were not made along functional lines; in the end a rough allocation of duties was made whereby finance went to the Exchequer, legislation to Parliament, judicature to the courts, and executive duties to the Council, but this classification of powers was never very strictly carried out. Parliament and Exchequer both had considerable judicial business. The courts did a certain amount of administrative work, and the Council had a large share in judicature as well as in legislation. The development of these different bodies, therefore, was not dictated primarily by any idea of the classification and separation of powers. It seems rather that the growth of these new institutions was determined along lines of administration. Types of business of frequent occurrence would necessarily encourage the development of a routine which would enable subordinate officials (if properly instructed in a well-planned procedure) to do the work in a regular and somewhat mechanical way. The bulk of their duties consisted in following a preordained mode of practice, and it is only in exceptional cases that they would find it necessary to invoke the discretion of the whole of the King's Court. We therefore find very soon the development of certain types of administrative practice, and around these systems there naturally gathered a group of officials who were skilled in the use of them. It is such groups of officials adept in a particular body of procedural rules which form the first beginnings of a new department or institution. The reason for their existence and the key to their activities is therefore a body of administrative procedure rather than a theoretical analysis of the powers of government. In the course of

[1] Bracton, f. 105 b; *Fleta*, II, 2; *Britton*, I, 1; all in Pound and Plucknett, *Readings*, 88–93.

time a number of such procedures appear, gather around them a little group of officials, and finally give rise to a new institution.

The first of these was the Exchequer which represents the oldest routine of government. About the year 1179 it was possible to write a very substantial treatise upon Exchequer procedure.[1] That procedure was primarily designed to do the King's bookkeeping and to watch his financial interests, but it was inevitable that many other matters should also arise. In the Exchequer twice a year all the great officials of the realm sat together to supervise the whole of the financial machinery.[2] At its head sat the Justiciar, and when that office became extinct he was replaced by the Treasurer; the Chancellor also attended and brought with him some of his clerks who issued process "from the Chancery in the Exchequer." At the close of the twelfth century the Chancellor's office had become so important in other directions that for the future he is only represented in the Exchequer by a deputy, the Chancellor of the Exchequer. With such a great array of high officials at the solemn meeting of the Exchequer, it was natural that any great difficulty could be immediately settled, for the highest authorities in the land were sitting around the table. The Exchequer, therefore, exercised from an early time a wide and vague discretion which was later described as its equitable jurisdiction, and was exercised in a small room adjoining the Exchequer buildings. This room and the court within it were called the Exchequer Chamber and its authority was enlarged on a number of occasions by statute, as we shall see later. At the same time a number of justiciable matters were bound to arise in connection with taxation and other fiscal rights, and these were dealt with in judicial form; this was the foundation of the common law jurisdiction of the Court of Exchequer. At the same time, a good deal of important government business of a general character was apt to take place on the occasion of a great Exchequer meeting, especially at Michaelmas term when besides all the high officials there were also in attendance all the sheriffs who were present for the examination of their accounts. In the first of these administrative routines, therefore, we see that a variety of functions were performed whose single bond of union

[1] See above, p. 17.

[2] See the passages from the *Dialogue of the Exchequer* in Pound and Plucknett, *Readings*, 81.

was the fact that they arose in the course of one procedure, that of the Exchequer.

We have already mentioned the very numerous Eyres which took place during Henry II's reign. Indeed the popular complaint was that there were too many of them, and in 1178 we find a remarkable passage in a chronicler [1] which tells us that —

"While he was staying in England, the King enquired whether the justices whom he had set up in England had treated the people fairly; and when he learned that the country and the people were much aggrieved by the number of justices (for there were eighteen of them), by the advice of the wise men of his realm he chose five only, two clergy and three laymen, all of his personal household, and decreed that these five should hear all the complaints of the realm, and do right, and not depart from the King's court but remain there to hear the people's complaints. And if any question should arise among them which they could not solve, they were to bring it up in the royal hearing for determination according to the pleasure of the King and the wiser men of the realm."

The latest interpretation of this passage, first suggested by Maitland and later modified by Pike and Adams, is that in 1178 Henry II by a deliberate act established a new court, which in later times became known as the Court of Common Pleas. Adams [2] insists that the powers of this court, like those of its descendant, the later Court of Common Pleas, were strictly limited, and that it was expressly debarred from exercising that wide discretion which was the privilege of the *Curia Regis*. Its foundation was suggested by the experience of the Justices in Eyre, and was designed to render available all the time the judicial advantages of the irregular Eyre, while, on the other hand, the high-handed action of certain of those justices was to be prevented by subjecting the new court to the supervision of the King's Council and by confining it within the limits of a strict procedure. This event of 1178 seems to be the culmination of a number of earlier experiments, which all had the general characteristic of subjecting the itinerant justices to the limitations set out in their commissions or instructions. Already in the middle of the twelfth century Maitland discerned signs of an old oral and traditional formalism, which by the end of the century is replaced by a new, written and authoritative formalism; and, as Professor Baldwin

[1] Benedict Abbas, in Stubbs, *Select Charters*.
[2] Adams, *Council and Courts in Anglo-Norman England*, 214 ff.

remarks, such limitations are appropriate to the new body of 1178, and not to the *Curia Regis* itself.

"It must be understood that the so-called formulaic and restrictive procedure began, and could begin, only in the courts held by the royal commissioners—that is, first by the itinerant justices and then the central court established on similar lines." [1]

It was a notable feature of the new court that its members were to remain with the King; a generation later *Magna Carta* will fix the Court of Common Pleas permanently at Westminster.[2] The second administrative routine to become an institution is therefore largely a judicial one, and after a period of experiment in the Eyres, it finally developed into the Court of Common Pleas, or "The Bench" as the older books call it.

The five justices who at first constituted the new court were expressly subordinated to the magnates and wiser men to whom difficult cases were to be referred. For some years the highest law court consisted, therefore, of these greater and wiser men who were in constant attendance upon the King. It is a constant recurrence in all this judicial and constitutional history that the group of advisers in the immediate presence of the King should exercise in his name a wide discretion, and that these powers should in no way be diminished by the successive developments of the Exchequer and the Court of Common Pleas. Just as the Exchequer had formed round the financial routine, and the Court of Common Pleas was to grow up with the common law forms of action, so the constant occupation of the King's immediate advisers with matters referred to them from the Common Pleas, and also with matters particularly touching the King, gave rise to a new body of procedure and soon to a new court—the Court of King's Bench, or, in its full mediæval title, "The Justices assigned for the holding of Pleas before the King himself." [3] In its early days it is impossible to distinguish these judicial proceedings before the King (*Coram Rege*) from proceedings before the Council, and the early rolls of the court are full of very miscellaneous acts of the Council. The procedures around which it

[1] Baldwin, *The King's Council*, 49.

[2] *Magna Carta*, (1215), c. 17; (1225), c. 11; Pound and Plucknett, *Readings*, 88.

[3] Remember that old books, in speaking of "The Bench," always mean the Court of Common Pleas, and not the King's Bench.

finally developed were the correction of error in the Common Pleas, and the trial of those pleas of the Crown which were of exceptional concern to the King.[1]

There are rolls still in existence bearing the proceedings of the ancient undivided *Curia Regis* beginning in the year 1194; a separate series of common plea rolls (technically called *de banco* rolls) begins in the year 1224.

For a long time it was a striking feature of the court before the King himself (*Coram Rege*) that it is indistinguishable from the Council. This applies not only to the class of business which it transacted, but also to its varying composition at different moments. In its most solemn sessions numerous magnates might attend; for less important business a small group of officials was sufficient. Although the two procedures which we have mentioned very soon appear (jurisdiction in error from the Common Pleas, and the trial of the more important pleas of the Crown), they are for a long time mingled with the political and administrative duties of the Council. In the end, these two procedures were both entrusted to a small group of professional justices who were specially commissioned "to hold pleas before the King himself." In other words, the King's Bench becomes a separate institution early in the reign of Edward I. For long after that date, however, there still remained a close connection between the King's Bench and the parent body. Just as in earlier times a piece of private litigation in the King's Bench, which raised a difficult point as to whether trial by battle lay or not, was adjourned "because there were not enough members of the King's Council present,"[2] so "the recurrence of pleas before the King and his council, *Coram Rege et consilio suo,* in this manner, can hardly be said to be discontinued until the reign of Edward III."[3] In the reign of Edward I, therefore, although the King's Bench had its own establishment, working its own procedure, and may therefore be regarded as a separate institution, there nevertheless existed a good deal of intimate contact both then and later between it and the Council.

[1] The ordinary pleas of the Crown were tried locally by commissioners of Eyre, gaol delivery, oier and terminer, etc.

[2] The document, dated 1240, is quoted in Baldwin, *The King's Council,* 53.

[3] Baldwin, *The King's Council,* 64.

In the thirteenth century this central group of officials and advisers who remained constantly in the King's presence was described by a variety of names; a chronicler will usually call it "the Council;" a law-writer such as Bracton, who is mainly interested in its judicial duties, will call it the King's Court or *Curia Regis*. As for those occasional meetings when this body is enlarged by the addition of numerous magnates, the chroniclers will usually call them a "colloquy," and such is at first the usual official term. In common speech, however, such meetings were often referred to as "parliaments." For a time this word was popular rather than official; it could be used of any sort of conference or meeting; even a disorderly assembly could be called a parliament, and in 1267 Henry III forbade the assembly of parliaments or other meetings in breach of the peace. In early days, therefore, the word "parliament" does not mean an institution but an event. Any unusually large meeting of the King's Council will be popularly described as a Parliament. A variety of influences began to work in the direction of giving more definite shape to these occasional Parliaments. As time goes on, the King's Bench will become as closely confined within the common-law forms of procedure as the Court of Common Pleas itself, and it will be necessary to provide some other means for the exercise of equity and discretion and for the handling of cases which fall outside of those limits. This task naturally fell to the Council, whose mission during a great part of the middle ages was to act as an extraordinary court of unlimited jurisdiction, both original and appellate.

These discretionary powers of the Council covered a wide variety of subjects. Some could be settled at the discretion of skilled official councillors, while others demanded the attention of a larger body of magnates; and so their work naturally falls into two groups—matters which could be handled by the Council continually attending the King, and matters upon which they preferred to take the advice of the magnates at large. An important discussion, whether of judicial matters or political, might equally be called a parliament, whether it actually took place in the smaller Council or in the larger assembly surrounding it. During most of the thirteenth century, however, such business, if recorded at all, will most likely appear upon the rolls of the King's

Bench, or *Coram Rege* rolls, as they are officially described. With the reign of Edward I, however, we find a new series of rolls appear for the first time, and these are the Parliament Rolls. The great bulk of the business on the early Parliament Rolls is of a judicial character, although not all of it is in the forms of the common law. By this time the King's Bench had lost most of its early discretionary powers and contented itself with working the common law forms of action and its own particular procedure; it was therefore Parliament which now undertook to wield some of the discretionary powers which the King's Bench had resigned—and herein we see the origin of the appellate jurisdiction of the House of Lords. Indeed, in the fourteenth century a case might move backwards and forwards between the King's Bench, the Council, and a Parliament of the Council, with the greatest ease. The judges of the King's Bench were in frequent attendance, both at the continual Council and at Parliaments. But besides this common law business, the Council was continually receiving a large number of petitions from individuals, churches, cities, counties and others, which were of the utmost variety. Some simply prayed for relief which was already to be had in the regular law courts; others, if the Council approved them, were transferred to the law courts, and the Council's endorsement served to supply any lack of jurisdiction which might otherwise have prevented them from giving a remedy; others merely demanded favors which the administration might grant or withhold, while others might raise very difficult questions upon which the Council would wish to take the advice of the magnates of the realm. Those petitions which the Council did not deal with alone were held over until one of the Parliaments, which were frequently held.

At the same time a remarkable development was taking place which was to modify profoundly the political aspect of Parliament. The strong, centralized monarchy of the thirteenth century was never tired of devising means for keeping in closer contact with local institutions. The annual visits of the sheriffs to the Exchequer and the frequent visits of Justices in Eyre to the various counties were still not enough; what the Crown particularly desired was an independent check upon the activities of its local officers, and a means of treating directly with the people. Various experiments were therefore made in the course of the

thirteenth century with this end in view. They were in fact simply an extension of machinery which had existed for many years. It was a familiar occurrence for every hundred, vill and borough to send representatives to the county court, where a general investigation would be made of local government and apparently a vote of taxes might occasionally be made. Nothing was more simple than to extend this time-honored system to the whole nation. Just as hundreds and vills appeared by representatives in the county court (more especially when the King's Justices in Eyre were present) so it was possible to call upon the county courts (together with the more important boroughs) to send representatives to meet the King himself when he and his Council were holding a Parliament.[1] Such representatives usually brought with them numerous grievances which they laid before the Council in the form of petitions, and this accounts for a large number of petitions which appear upon the Parliament Rolls—to say nothing of many more which were never enrolled at all. By Edward I's reign, therefore, a Parliament of the Council may consist of a number of elements. There may be a greater or less number of magnates and prelates; there may or may not be a collection of representatives of the various communities of the land (who will afterwards be called the Commons, or in French *Communes*); at the same time it was customary for the lower clergy also to be represented by proctors, and these will form the later convocation. But in the center of all this, controlling and directing all the proceedings, is the King's Council. It is the King's Council which is the active motive force in the Parliament; the lords, the commons and the clergy merely attend to answer the Council's questions, to advise it upon points referred to them, and to present humble petitions for the redress of their grievances. It required a powerful monarchy to organize such an institution. It is a constant observation in the middle ages that it is only the strongest kings who can compel their subjects, be they lords or commons, to give them advice, to attend their courts, and to take part in the work of government. Centuries later Parliament will become an instrument, first in the hands of

[1] The details of this process belong to constitutional rather than to legal history. Early experiments were made from 1213 onwards; "Model" Parliaments were held in 1275 and 1295. See Adams, *Constitutional History of England*, and Pollard, *Evolution of Parliament*.

the lords and later of the commons, which can be turned against the King himself and his Council. But this is far in the future; Parliament was not intended to play that rôle when it first took rise. In its earliest days it was a sign of royal strength and not of royal weakness, and this can be seen from the fact that the weaker kings had great difficulty in collecting a Parliament at all.

The future of Parliament may be political, but its origin was legal and administrative. In its origin and throughout the middle ages it deserved its later title of the "High Court of Parliament"—and in this expression it must be remembered that the word "court" must be taken in the broadest mediæval sense.

We have insisted that the real center of Parliament in the middle ages was the King's Council. *Fleta* expresses this idea when he says that "the King has his court in his Council in his Parliaments," [1] and as late as the fifteenth century it is abundantly clear that the Council was the moving force in Parliament; even at so late a date a chronicler will speak of a "Parliament of the Council," and we constantly find official documents which say that "the King by the advice of his Council in Parliament" has taken certain action. Even at the present day the brilliant ceremonial with which the King opens Parliament bears witness to this fact. The proceedings take place in the House of Lords. The King on his throne is surrounded by the councillors standing on the steps of the throne; immediately in front are four woolsacks in the form of a hollow square upon which sit the judges (and in former times the law officers of the Crown); this little group of the King and his councillors and judges (who anciently were active members of his Council) is the core of the Parliament. At a greater distance are assembled the peers of the realm and the prelates, and so we see *Fleta's* phrase visually expressed, "the King is in his Council in his Parliament." Right at the bottom of the room is a bar, and outside of the bar are the latest additions to the constitution of Parliament, the Commons. They are always standing,—the older pictures show them kneeling,—and at their head is the Speaker. He derives his title from the fact that of all the Commons present the Speaker alone has the right of raising his voice in the Parliament, and then at first it

1 The passage is translated in Pound and Plucknett, *Readings*, 89.

is only to pray that he may have permission to correct his mistakes if he should make any; later, in the reign of Henry VIII, he became more bold, and prayed for the allowance of the Commons' privileges.[1] This ceremonial faithfully reproduces the appearance of a Parliament of the early fourteenth century. Whatever deliberations the Commons or Lords may make among themselves are merely their private concern; the proceedings in Parliament take place when the Council is present, attended by the lords, and in those proceedings the Council plays a dominant part.

With the close of the middle ages the position of the judges in Parliament becomes less important. They attend upon ceremonial occasions, and give advice when called upon, but no longer take a regular part in its general business except for the purpose of handling certain types of petition, and soon this too becomes obsolete.

And so by the reign of Edward I we have all the elements, save one,[2] of the present judicial system of England. There was the Bench, or Court of Common Pleas, where the common law forms of action were developed and where the bulk of the litigation of the country took place (with the exception of the smaller matters which went before the local courts). Then there was the King's Bench which had a jurisdiction in error from the Common Pleas, and an original jurisdiction over the Pleas of the Crown of unusual importance; it is the proper place for State trials and for matters which closely concern the King. Above the King's Bench, and working in close harmony with it, is the King's Council, which is ready to supply from the reserves of royal discretion at its command any defects of jurisdiction which may occur in the lower courts, and to take the advice of a Parliament, if necessary, to resolve their doubts and remove their difficulties. In the Council, in Parliament, and to some extent in the King's Bench, there is, therefore, an ample source of equity, discretion and extraordinary power to meet any emergency. At the same time the King's financial interests are controlled by the Court of Exchequer, and difficult legal questions can be informal-

[1] Chancery was not yet a court of equity.

[2] See Neale, *The Commons' Privilege of Free Speech* (in Tudor Studies presented to A. F. Pollard, 257–286).

ly discussed in the Exchequer Chamber by a full meeting of all the available legal talent. As for the ordinary criminal jurisdiction, there were many local authorities with summary powers, which were supplemented by numerous visits of commissioners of jail delivery (who delivered the jails of prisoners committed for trial), and commissioners of oier and terminer, who had wide powers of holding pleas of the Crown. Both these classes of commission were in constant use and their activities were recorded upon hundreds of assize rolls. At the same time certain types of common plea called assizes which were of very frequent occurrence were also heard locally by traveling commissioners of assize, who only reserved points of special difficulty for discussion at Westminster in the Court of Common Pleas. All these were in existence in Edward I's reign.

In the course of the fourteenth century, reforms and extensions took place. Legislation beginning with Edward I in the Second Statute of Westminster (1285) slowly built up the system of *nisi prius,* whereby actions which began at Westminster in the Court of Common Pleas, when once they had been pleaded to an issue, could be continued by taking the jury's verdict in the county before justices of *nisi prius,* instead of compelling the jurymen to undertake a costly journey to Westminster as had formerly been the case. The rise of this system had the result that a great deal of jury work took place in the country and not in Westminster; such proceedings were rarely reported, for the compilers of the *Year Books* were most concerned with what went on at Westminster Hall, and so the whole procedure of putting evidence before a jury, charging it, and taking its verdict is an obscure matter, for neither the reporters nor the rolls give us very much information. Of these two sources the rolls are perhaps the more promising for the early history of the law of evidence.

Besides these traveling commissions, both new and old, which were sent through the country from Westminster, there developed a new type of commission composed of local gentry who were assigned first to keep the peace, and afterwards to be justices of the peace. From the end of the twelfth century local knights and gentry were occasionally called upon to co-operate with the sheriff in enforcing law. Their duties were rather of an administrative and police character. The Statute of Winchester

(1286) organized this system, and in the beginning of Edward III's reign a stream of legislation begins to enlarge their powers. As before, they were to receive prisoners and to produce them to the justices of jail delivery—and here it seems that the Crown showed some distrust of the sheriff who ordinarily would have performed these duties; indeed, the justices were given authority in 1330 to punish the sheriff if he abused his powers of releasing prisoners upon bail. Very soon they were allowed not only to keep prisoners, but to try them, and in 1344 it was enacted "that two or three of the best people of each county should be assigned as guardians of the peace by the King's commission;" and that these keepers should be associated with lawyers in a commission of oier and terminer for the trial and punishment of felonies and trespasses against the peace.[1]

Then in 1349 came the Black Death, and in 1352 began the Statutes of Laborers which attempted to regulate the disorganized labor market. This labor legislation set up an elaborate machinery for fixing wages and enforcing labor contracts, and established "justices of laborers" for the difficult task of enforcing it. Shortly afterwards the keepers of the peace and the justices of the laborers were merged into one commission with the new title of justices of the peace, which first appears officially in 1362. For the rest of the middle ages, and indeed down to the present day, hardly a Parliament passed without adding some new duty to the work of the justices of the peace. At first they received salaries payable out of the fines which they inflicted, but as time went on the change in the value of money made their wage too small to be worth collecting: it has now long been obsolete. They were and still are laymen and not lawyers, but it must be remembered that during the middle ages the average landowner had a fairly good knowledge of elementary law; what further technical assistance they needed was supplied by the clerk of the peace who served as a professional clerk to the justices. The clerk of the justices was frequently appointed also to the office of clerk of the Crown, the duties of which were to act as a permanent secretary to the traveling justices who came down from Westminster to hold the pleas of the Crown. The clerk of the peace was technically the deputy appointed by the *Custos Rotu-*

[1] 18 Edw. III, Stat. 2, c. 2.

lorum, a mysterious official of whose history very little is known.[1]

The justices of the peace, like most other mediæval bodies, held two sorts of meetings, large and small. The large meetings held four times a year are called quarter sessions. In the fourteenth century they must have looked something like the older Eyre, although on a smaller scale. A grand jury was charged, made its presentments, and the persons so indicted were forthwith tried. Until the eighteenth century, quarter sessions tried capital cases, which after that date they reserved for the Justices of Assize. Quarter sessions also possessed an appellate jurisdiction from petty sessions. Petty sessions on the other hand consisted of two or more justices acting in the most informal manner for minor business and the lesser offences. Both quarter and petty sessions were ultimately subject to the Court of King's Bench which by a writ of *certiorari* could review their proceedings.

The establishment of the justices of the peace marks the end of the practical importance of the old communal jurisdictions which we described in Chapter I. Whether the justices of the peace were meant to take the place of the local jurisdictions which had already declined, or whether, on the other hand, they were part of a deliberate policy whereby the Crown attempted to supplant local jurisdictions (dependent as they usually were upon the sheriff), it is impossible to say; there may be some truth in both views. It is certainly significant that the justices of the peace were fairly closely supervised by the law courts and by the Council; in this way they became not merely the local representatives of the royal jurisdiction, but also to a large extent the administrative and political agents of the King and Council. During the later Stuart period the government tried to exploit to the utmost the political influence of the justices of the peace.

Coincident with the rise of the justices of the peace in the later fourteenth century, we find notable changes in the King's Council. By this time Parliament itself had become an institution which to some extent could be regarded as separate from the Council. The Council nevertheless remained in its ancient position of a small group of officials, household officers, clerks and advisers, continually attendant upon the King, and therefore

1 See Putnam, *Early Treatises on Justices of the Peace*, 102–104.

exercising in his name that residuum of discretion and equity which was inseparable from the royal person. As Parliament became more settled in its powers, petitioners who sought extraordinary relief addressed themselves to the Council; and in any case, even if their petitions had been presented in Parliament, it was most likely that it would be the Council which actually passed upon them. Indeed, a variety of addresses occur in the petitions of the middle and later fourteenth century. Sometimes they are sent to the King, sometimes to the Council or the Parliament, and sometimes to the Chancellor or some household official. In any case it was the Council which generally took action, irrespective of the address upon the petition. The administrative and political duties of the Council were already exceedingly heavy, and the mass of petitions which streamed in every day immensely increased its task. Then, too, besides petitions, the Council itself would sometimes initiate proceedings of a semijudicial character by calling upon some local magnate who was too powerful to be reached by the ordinary courts, to appear before the Council under the penalty (*sub pœna*) of a sum of money to answer for his misdeeds—which were usually some form of oppression or disorder. The Council therefore found itself burdened with a growing task of semijudicial business; some of it could be transferred to the courts of common law, but some of it had to be considered by the Council itself, either because unusual relief was necessary, or because the parties were too influential to be amenable to the ordinary process of the courts. The problem arose of how to deal with this business. The same solution was found as in previous cases. A routine was established and officials were assigned for its working, only in this case an already existing institution, the Chancery, was used to carry out these new duties.

A variety of theories have been proposed to account for the origins of Chancery jurisdiction, but the result of the most recent research has been to establish an old theory first put forward by Palgrave.[1] According to this view the Chancellor's jurisdiction was not by virtue of his office; still less had it anything to do with his supposed position of keeper of the King's con-

[1] Palgrave, *Original Authority of the King's Council* (1834); Baldwin, *The King's Council* (1913), 236–261.

science. At a later date, it is true, Chancery became a court of conscience, with a jurisprudence deliberately based upon this idea, but this was a later development and will not account for the earliest period of Chancery history. It now seems clear that the Chancellor's position was originally that of a delegate of the Council. Overburdened with work of every description, the Council delegated particular matters to the Chancellor, who of all the officials was the one who was most constantly in attendance. Another advantage of this arrangement was that the Chancellor already had a well-organized office staff, and for a long time had exercised the power of issuing writs both judicial and administrative to all the King's officials, central and local. The Chancellor, therefore, commanded the machinery which sooner or later would have to be set in motion in order to give redress to the petitioners, and so nothing could be simpler than for the Council to transmit the petitions addressed to it to the Chancellor, sometimes (but not always) endorsing them with a brief instruction what to do.

It is only natural that petitions concerning civil matters should be treated in this way. Many petitions, however, raised questions of a criminal character. As we pass through the fifteenth century, disorder and oppression by local magnates constantly becomes more common; petitioners are continually complaining of the lawlessness of their great neighbors, and it is perfectly evident that the courts of common law are helpless in face of this situation. Their procedure was too slow and too mild; juries and sometimes judges were intimidated by large forces of retainers who constituted the private armies of unruly subjects. With such grave matters the Council alone was powerful enough to deal. Peremptory commands to appear before the Council were much more effective. Consequently the Council retained the effective control of these graver matters in its own hands. The Council's original jurisdiction, therefore, shows signs of dividing into two portions, its civil jurisdiction being exercised in its name by the Chancellor, while its criminal powers are exercised at the Council board.

When, finally, the House of Lancaster had fallen and the Yorkist, Edward IV, had established himself upon the throne, important changes took place in the Council. As far as we can judge (the affair is somewhat mysterious) what happened was

this:[1] The Council lost the power of controlling the administration which it had exercised so rashly under the Lancastrian kings. Edward IV retained in his own hands the control of the state machinery, which he operated through officials responsible to him alone. The Council's attempt to become the supreme power in the State failed with the fall of the House of Lancaster. The evidence which survives of the Council's activity under Edward IV is very scanty indeed; yet on the other hand we know that the Council was a very large body. It would seem that Edward IV deliberately confined its activities to the sort of business we have mentioned, namely, the handling of petitions, especially when those petitions raised questions of public order and the administration of criminal law. Of the many rooms which the Council used in the fifteenth century its favorite seems to have been the Star Chamber, and from the reign of Edward IV onwards it seems that the Council is steadily turning into the Court of Star Chamber.

Not until the reign of Henry VIII do we find the deliberative and executive functions of the old Council revive. But by this time the old Council had become the Court of Star Chamber with a large and regular judicial business. Henry VIII, therefore, had to create a new institution, the Privy Council. When the Court of Star Chamber was abolished in 1640, the old mediæval Council at last came to an end, and there only remained Henry VIII's recent invention, the Privy Council.

A word must be said of the famous Act of 1487.[2] Old writers take it as the statutory origin of the Court of Star Chamber, principally on the strength of a marginal title on the statute roll which reads *"pro camera stellata."* So firm was this belief that when the court was abolished in 1640 the Act of 1487 was repealed. It has now been shown that this act has no connection with the Star Chamber, and that the marginal title is an addition in a later handwriting. The act's principal effect was to emphasize the separation between the civil jurisdiction of the Chancery and the criminal jurisdiction of the Council, for it called upon

[1] Plucknett, *The Place of the Council in the Fifteenth Century*, Transactions of the Royal Historical Society, 1918, 186–8.

[2] 3 Hen. VII, c. 1; Baldwin, *The King's Council*, 438–442; 3 Bulletin of the Institute of Historical Research, 115 and plate II; Pollard, *Council, Star Chamber and Privy Council under the Tudors*, 37 English Historical Review, 516.

the principal officers of State[1] to exercise wide powers for the repression of serious crime—and it is certain that they had already exercised these powers for many years. In short, the act was one more public threat by the government which proclaimed its intention of vigorously enforcing the law by a summary procedure in the Council.

During the Tudor period we find remarkable activity in the erection of new courts which took a peculiar and significant direction. Gardiner, and later Dicey, have made some remarks upon the policy which underlay these innovations, and observe that the Tudor monarchy bore a striking likeness both in theory and in practice to that of France.

"A lawyer, who regards the matter from an exclusively legal point of view, is tempted to assert that the real subject in dispute between statesmen such as Bacon and Wentworth on the one hand, and Coke or Eliot on the other, was whether a strong administration of the continental type should, or should not, be permanently established in England. Bacon and men like him no doubt underrated the risk that an increase in the power of the Crown should lead to the establishment of despotism. But advocates of the prerogative did not (it may be supposed) intend to sacrifice the liberties or invade the ordinary private rights of citizens; they were struck with the evils flowing from the conservative legalism of Coke, and with the necessity for enabling the Crown as head of the nation to cope with the selfishness of powerful individuals and classes. They wished, in short, to give the government the sort of rights conferred on a foreign executive by the principles of administrative law. Hence for each feature of French *droit administratif* one may find some curious analogy either in the claims put forward or in the institutions favoured by the Crown lawyers of the seventeenth century." [2]

These theories of the royal power found their natural expression in the Council and the Court of Star Chamber which may very well be compared with the Council of State (*Conseil d'Etat*) which crowns the system of administrative courts in France. The old writ *de non procedendo rege inconsulto* was used to attain part of this purpose.

"The working of this writ, if Bacon had obtained his object, would have been to some extent analogous to that provision which has been found in so many French constitutions, according to which no agent of the government can be summoned before a tribunal for acts done in the

[1] For some other powers which it was proposed to confer upon the same group of officers, see 4 Holdsworth, 458 n. 6.

[2] Dicey, *Law of the Constitution* (8th ed.) 365–366.

exercise of his office without a preliminary authorization by the Council of State." [1]

With the prevalence of these ideas it is natural to find the creation of numerous courts upon the model of the Council. Many of them have faint beginnings in the reign of Henry VII or even earlier, but it is to Henry VIII and Elizabeth that they owe the bulk of their power. We have already mentioned the Council and the Star Chamber; there were many more besides. The Chancery perhaps had lost some of its original contact with the Council by this time, for its procedure centered around the Great Seal, which was now an old and independent organization. The administrative link which united the Council courts was their common use of the Privy Seal, and here the Star Chamber shared the same organization as the Court of Requests. This tribunal first appears in 1493 and was modeled to some extent on the *Chambre des Requêtes,* a similar institution in France. Under Henry VII it was, in effect, a committee of the Council for the hearing of poor men's causes and matters relating to the King's servants. Sometimes it appears in two divisions, one at Westminster and the other travelling with the King. Its jurisdiction was mainly civil, although at times it entertained matters of a criminal character, such as grave disorder, forgery, etc., and for some time the court seems to have been genuinely popular. Towards the end of its career it lost this reputation owing to the growing complexity, slowness and expense of its proceedings.

Exercising concurrent jurisdiction with the Council and the Star Chamber were two other courts, the Council of Wales and the Council of the North. These remarkable bodies combined with the utmost facility the political business of governing Wales and the North (where there was considerable unrest at this time) with such judicial duties as seemed to them expedient. They controlled the local government within their area, and acted as courts of equity and of extraordinary criminal jurisdiction.

At the same time courts were erected for the administration of certain financial matters. The Court of Wards and Liveries controlled the ancient feudal revenue of the Crown connected with wardship, and combined administrative and judicial functions; the Court of First Fruits and Tenths acted similarly in

[1] Gardiner, *History of England,* iii. 7 n. 2, cited by Dicey *loc. cit.*

respect to certain papal revenues which were taken over by the Crown at the Reformation, the Court of Augmentations managed confiscated monastic property,[1] while the Court of High Commission exercised the ecclesiastical jurisdiction of the Crown under the Act of Supremacy.

Throughout the Tudor period most of these courts flourished, but with the advent of the Stuarts they became more and more involved in the great constitutional conflict; where the Tudors had used them with moderation for the legitimate purposes of government, the Stuarts used them as an engine of oppression. The common lawyers then began to examine the legal foundation of their jurisdiction. In the name of conservatism the common lawyers put forward some curiously novel theories; they objected that some of these prerogative courts had no statutory authority (but neither had the common law courts for that matter); nor did they record their proceedings upon rolls drawn up in Latin; and finally in 1641 the Courts of Star Chamber, Requests, and High Commission were abolished by statute.

Although Tudor activity was principally directed to the prerogative courts, a few reforms were also made in the system of common law jurisdiction. The Court of Exchequer Chamber was re-organized by a Statute of Elizabeth in 1585,[2] although in the end the result was an increased confusion in the court's jurisdiction and an addition to the expense of litigation; this was particularly due to the fact that by the statute the Exchequer Chamber was given a jurisdiction in error from the King's Bench, and so one more costly step was added before litigants could reach the final court of appeal, the House of Lords.

At this point, where we leave the middle ages and enter definitely upon modern times, it is well to remember the striking passage in Maitland's *Constitutional History* where he indicates six principles which combined to increase the jurisdiction of the royal courts. They are briefly these:[3]

(1) Under the Norman kings the Crown by its writ of right supplied the real or imaginary defects of justice in the feudal courts.

1 Queen Mary transferred their powers to the Court of Exchequer.

2 See Pound and Plucknett, *Readings*, 96–98.

3 Maitland, *Constitutional History*, 111–114; Pound and Plucknett, *Readings*, 82–85.

(2) Under Henry II it was established that no man need answer for his freehold without a royal writ unless he cared to.

(3) Henry II also ordained that a defendant in certain pleas of land in the King's Court could have jury trial (grand assize) instead of battle if he chose.

(4) The possessory assizes established by Henry II deliberately ignored the feudal courts and by their swiftness immediately became very popular.

(5) The idea of contempt was used very effectively. The King would issue a writ ordering a subject to do right and justice, and if he refused, he was guilty of contempt of the King's writ. The defendant in a writ of debt, for example, not only denies his liability, but also denies tort and force in resisting the King's command.

(6) The idea of the King's peace was not only the basis of criminal jurisdiction, but could also be used to enlarge the civil jurisdiction of the King's Court. This was effected through the action of trespass, which although criminal in form was constantly becoming more and more a civil action.

If these considerations explain the rise of the common law courts, the courts of prerogative and equity rested upon foundations no less ancient. There always remained in the King himself a residue of discretion which could be used through his Council as equity and expediency required. And so we find in the fourteenth century the beginnings of the Chancellor's equity jurisdiction,[1] while before the close of the fifteenth century the Star Chamber, the Court of Requests and the Councils of Wales and the North continued the work of providing extraordinary remedies in cases where there was a *de facto* or a *de jure* failure of justice.

With the reign of Elizabeth, however, we enter a distinctly modern atmosphere. Courts are soon to be established and abolished and their jurisdiction extended or restricted at the will of the legislature, and a number of acts of Parliament amended the judicial system in various respects. At the same time the courts are apt to take matters into their own hands. If their jurisdiction is unsatisfactory, or if they feel the competition of other courts, they will remedy the situation in their own way, which

[1] 1 Holdsworth, 240; Pound and Plucknett, *Readings*, 98.

is frequently the invention of legal fictions. The Court of Exchequer by the writ of *quominus* undertook to hold common pleas under the fiction that one of the parties was a Crown debtor.[1] Then the Courts of Common Pleas and King's Bench undertook a long and complicated war. King's Bench assumed an original jurisdiction over common pleas by treating the defendant as actually or fictitiously in the custody of the marshal of the King's Bench. The theory was that if a man is already in the King's Bench prison he can only be sued there and not in other courts. This device needed an elaborate machinery and was complicated by legislation; its principal factor was the "Bill of Middlesex." The Common Pleas replied with a somewhat similar invention; this consisted in arresting the defendant in a writ of trespass *quare clausum fregit* and then charging him with additional matters by a supplementary clause in the writ beginning with the words *ac etiam*.[2] More than that, the courts of common law joined in a warfare upon the courts of equity, and so we have the extraordinary spectacle of a court of equity enjoining parties from suing at common law, and of common law courts prohibiting parties from suing in equity.[3] This state of affairs from occasional beginnings in the middle ages became common in the closing years of Elizabeth, and under the early Stuarts developed into a bitter feud, largely under the influence of Coke.

A word or two must be said of the highest court in the land, Parliament, or, as it soon became, the House of Lords (for the Commons deliberately resigned the bulk of their share in the judicial business of Parliament). In the fourteenth and fifteenth centuries the Lords exercised jurisdiction in error from the Court of King's Bench, and after Elizabeth's statute from the Court of Exchequer Chamber which was now interposed between the King's Bench and the House of Lords. For a long time there was doubt whether the House of Lords could hear appeals from the equity side of Chancery, and it was only after the Restoration that the House (after a conflict with Commons) finally assumed these powers. Until then appeals from the Chancery were heard

1 1 Holdsworth, 240; Pound and Plucknett, *Readings*, 98.

2 1 Holdsworth, 219–222; Pound and Plucknett, *Readings*, 99–101.

3 For some illustrations of this conflict see Pound and Plucknett, *Readings*, 198–205, and Maitland's remarks, *ibid.*, 212.

by specially created commissions. Soon afterwards they heard appeals in equity from Ireland, and since the union with Scotland in 1707 they have heard appeals from the Scotch courts.

The criminal jurisdiction of the House of Lords has a curious history. Early in the fourteenth century the Crown accused and tried great offenders in the Lords; so, too, a subject could "appeal" another of a crime before the House of Lords and wage battle. Both of these methods, however, did not survive the middle ages. Impeachment, however, is still theoretically possible under English law, although it has never been used in the last century and a quarter.[1] The procedure consists of an accusation by the Commons and a trial by the House of Lords; the first case is in 1376, and from then onwards it was used on several occasions against royal officials. Its constitutional importance is therefore considerable. Between 1459 and 1620 no cases occur, but they become frequent in the seventeenth century. The last example was in 1805 and at the present day it is clear that there is little need for reviving this method.[2] The procedure is slow and very complicated and is now unnecessary, for the rapid growth of criminal law has given the ordinary courts power to try ministers and others for an immense variety of offences. Impeachment served a useful purpose in days when the criminal law was very inadequate, and when a variety of malpractices were probably beyond its reach.

A word may be said about attainder. In form an act of Parliament, the attainder needed the consent of King, Lords and Commons, and only under the Tudors did the accused sometimes obtain leave to defend himself. It dates from the time when the legislative and judicial power of Parliament was completely merged in the one procedure of "judgment." It has long been obsolete in England and is constitutionally forbidden in this country. It was most common during the Wars of the Roses.

And finally, peers accused of felony may claim trial by their peers, and such a trial takes place in the House of Lords, if Parliament is sitting, with the Chancellor presiding. If Parliament is not sitting, then the Lord High Steward holds the King's Court (just as a steward might hold a manorial court), and the attending peers act as a jury, subject to the directions in matters

[1] Impeachment is by no means obsolete in America.

[2] But see the suggestions of 1 Holdsworth, 385.

of law which the Lord Steward may give. When Parliament is sitting, however, the position of the peers is very different, for then they need not be unanimous, and may pass on both law and fact. The origin of this strange distinction and the history of the Steward is very mysterious; a puzzling feature of the matter is the allegation that a leading case in the *Year Book* of 1400 is a forgery.[1]

With the nineteenth century we come to a period of radical reform; a number of commissions sat between the years 1824 and 1834 examining in detail the whole field of legal procedure. Still another body of commissions was at work in 1853 and the result of their labors was the Common Law Procedure Act of 1854. This act removed many of the occasions of shifting a case backwards and forwards between common law courts and Chancery. It was only in 1873 that the Judicature Act, amended in 1875, carried out a reform root and branch. Common law and equity were now no longer separated, and the system of appeals was simplified. After some hesitation the House of Lords was retained as the ultimate court of appeal for the United Kingdom, and was strengthened by the appointment of distinguished lawyers as life peers with the title of Lords of Appeal in Ordinary. Below the House of Lords was the Court of Appeal consisting of Lord's Justices. Below the Court of Appeal was the High Court of Justice sitting in a number of divisions for the sake of convenience, although the divisions did not constitute separate courts.[2]

There only remained the question of appeals from colonial courts and ecclesiastical courts. These appeals regularly went to the Privy Council which had always acted as the special supervisor of colonial affairs, and also advised the Crown on matters arising out of the royal supremacy over the Church. This jurisdiction was consolidated and regulated in 1833 by an act which conferred statutory powers upon the Judicial Committee of the Privy Council, whose procedure is to hear the arguments on the

1 See Harcourt, *His Grace the Steward*, and the controversy in 23 Law Quarterly Review, 442, and 24 *ibid.*, 43; *Y. B. 1 Hen. VI*, 1. There are traces of several mediæval attempts to manufacture evidence enhancing the powers of the Lord High Steward.

2 Those parts of the Judicature Acts which are most essential for an understanding of the present English system are to be found in Pound and Plucknett, *Readings*, 101–114.

appeal and report their recommendations to the Crown in Council. It is a matter of great practical convenience that the Judicial Committee and that portion of the House of Lords which customarily concerns itself with appellate business [1] should consist for a large part of the same members.

One recent change has been made. In 1907 the case of Adolf Beck showed the necessity for a court of criminal appeal, and such a court was therefore established with powers to review questions of law, and sometimes of fact; if the Attorney-General certifies that a legal point of exceptional importance is involved, an appeal will lie further to the House of Lords. At the same time the Court of Crown Cases Reserved was abolished.

[1] Theoretically any peer may vote on appellate hearings; as a matter of custom only the "Law Lords" take part.

CHAPTER VI

THE LEGAL PROFESSION

It is very difficult to say at what date professional lawyers first appear in the common law system. We could hardly expect to find them until there was a settled jurisdiction with regular courts; and, as we have seen, it took some time before these elementary conditions were reached. In this, as in many other matters, it is necessary to consider the local and the central courts separately if the discussion is to be put in the right perspective.

In the ancient local communal courts there was often some specialization along legal lines, but those lines did not at all correspond with the present organization of the profession. Certain legal functions became attached to certain pieces of land (eventually becoming hereditary like the land), but they were judicial functions. We constantly find that attendance at courts is "real" and an incident of tenure; we even find some tenants holding by the services of advising the court, or of taking part in its sessions, when particularly difficult questions are under discussion. But we hardly find any trace of lawyers who make a living by giving advice to actual or prospective litigants. The only trials in the Anglo-Saxon age which we can follow in any detail are important cases involving high ecclesiastical dignitaries, and yet even they seem to conduct their cases in person. There is no convincing evidence of a legal profession in the Anglo-Saxon period.[1] After the Conquest there seems no trace of professional lawyers in the local courts until after they have already become established in the central courts; whence it would appear that local bars were imitated from the royal courts at Westminster.

As for the central courts, for some time it seems that there

[1] The portion of Mr. Herman Cohen's *History of the English Bar* (London, 1929) dealing with the Anglo-Saxon and Norman ages collects every available scrap of evidence and yet fails to establish the point.

were no professional advocates. Proceedings were informal, and at times (as Maitland remarked) hardly distinguishable from a family quarrel. The parties themselves presented their case as best they could before the King, who was attended by such nobles, clergy and trusted advisers as happened to be at court at the moment.

The growth of the King's intervention, measured by the extension of the use of royal writs, had the effect that the hearings were now more commonly delegated to a group of courtiers (who in time became a regular bench), and inevitably, as soon as business was entrusted to deputies, it became necessary to confine them within a routine, a strict procedure, a set of forms, and a system of pleading. These in turn necessitated the growth of a legal profession, for the public could hardly be expected to understand the newly invented office machinery of the King's Court.

Not until the reign of Edward I do we find clear evidence of an *organized* legal profession, and the coincidence with the beginning of the *Year Books* is certainly significant. In the preceding reign events had already indicated that convenience required two sorts of lawyers—pleaders and attorneys. The attorney is appointed by the party in court, under elaborate safeguards, and has power to bind his principal. His appearance or default is equivalent to that of his master; he has power to commit his master to a particular plea. Such a lawyer needs great integrity and diligence, although perhaps no great powers of intellect or learning other than procedural. The attorney was a great convenience to wealthy landowners who were constantly involved in litigation and found it troublesome to appear personally, as also to ecclesiastical bodies and others, but law was becoming so complicated that the public needed a different sort of assistance. Already in Henry III's reign there had appeared a new type of professional lawyer. A plaintiff no longer felt confident that he could even tell his tale in court without making slips, while, as for the later proceedings, they would certainly be even more tricky. So he would resort to an experienced *narrator* (or *conteur* as they put it in French) who told the tale for him. Very soon the *narratores* become a regular profession, and later still assume the style of "serjeant-at-law," and their exploits form the subject of the *Year Books*. On the other hand, they figure but little on the plea rolls which are more concerned

with the attorney whose acts have authority to bind the principal. The well-organized ecclesiastical bar no doubt was an influential model in all this. The serjeants from the beginning held a high place in the legal world; Parliament soon refers hard questions to the serjeants as well as to the judges, and quite soon in the fourteenth century the Crown adopts the policy of recruiting the bench from the outstanding men at the bar. Where this policy has been thoroughly adopted, the result is a remarkable relationship of good will and understanding between judge and barrister, which permits of real co-operation in the administration of justice. A spirit of hostility or distrust between bench and bar, on the other hand, inevitably adds to the length of proceedings, without improving the quality of the product.

An inevitable result of the development of a professional element of this kind was the tendency to perpetuate itself by a system of legal education, and it is in this connection that we first find official recognition of the new state of affairs. In 1292 a royal writ was sent to Mettingham, J., and his fellows of the Common Bench, in these terms:

> "Concerning attorneys and learners ('apprentices') the lord King enjoined Mettingham and his fellows to provide and ordain at their discretion a certain number, from every county, of the better, worthier and more promising students . . . , and that those so chosen should follow the court and take part in its business; and no others." [1]

It will be seen that this writ did not touch the existing pleaders, but merely made arrangements for perpetuating the profession by putting aspirants under the control of the court. The use of the word "apprentice" suggests that the student was attached to a practising pleader whom he assisted in minor matters in return for instruction—such was the general nature of the apprenticeship system in the middle ages. On this point there is little light; but we soon find that the apprentices have a special enclosure, humorously called the "crib," from which they could follow the proceedings in court. It is also clear that some of them were no tyros either; they will criticize the serjeants on occasion, and the earlier *Year Books* think it worth while to record "what was said in the crib." The functions of the serjeant are easily distinguished from those of the attorney. The arguments, the clever altercations which at this period seem to be conducted *ex*

[1] 1 Rot. Parl., 84.

tempore (later they will be written down with great particularity as written pleadings), the offering of exceptions and answering them, the groping through masses of doubtful facts and uncertain law in search for a safe point on which to take issue, the arguments upon the inevitable faults in process, and upon the legal consequences of an ascertained state of facts—all this is the highly skilled work of the serjeants. To it they brought various gifts, sound legal learning above all, supported by quick wit, resource and ingenuity—sometimes even a clever fallacy may be tried; but the bench consists of men who have already passed by the bar, and from the *Year Books* it is clear that the court was not easily fooled, and good-naturedly it would sometimes remind a serjeant so. Once when an extra-subtle point was raised, the court was unimpressed; the judge remembered that he himself had once resorted to it while at the bar taking a case for which there was nothing better to be said.[1] The court constantly declined to be lured into discussions too far removed from the question judicially before it; it would sometimes close a discussion where it suspected that the apprentices had manufactured a difficult case for the sake of enjoying the arguments upon it.[2] Even a *bona fide* case involving difficult questions would be adjourned term after term until the parties found a compromise, rather than allow the court to be enticed out of its depth. The proceedings were therefore as practical as contemporaries could make them: no unnecessary pedantry or cleverness, and above all no oratory. Nowhere during the middle ages do we find a trace of rhetoric in the English courts. True to their administrative origin, they kept themselves in a strictly business attitude. It is only after the Renaissance that we find the bad old classical tradition of Greece and Rome which turned lawsuits into an oratorical contest appearing in England.

The earliest *Year Books* show us the serjeants conducting these altercations (which later are so carefully arranged by counsel in written pleadings) orally in court, and apparently with little previous knowledge of what lay behind them or of which way they would turn. It seems that there was always room for surprise, and that each side did its utmost to conceal the facts from the other side. From this it will be seen that a successful ser-

[1] *Year Book* 15 *Edw. III* (Rolls Series), 390.
[2] *Year Book* 33–35 *Edw. I* (Rolls Series), 64.

jeant depended upon quick thinking in order to understand his own case and his opponent's, for it would seem that there was little work done on a case before it came into court. It is not surprising, therefore, that the group of serjeants practising in the last years of Edward I was small, very busy and amazingly clever. As we shall later see, the *Year Books* of this period are full of admiration for the brilliant serjeants whose feats of intellect are there recounted, and the modern reader can entirely share that feeling; from 1300 to 1320 there was a very brilliant bar in England.

As we have seen, the serjeant was rather in the dark about his case until he had wrung a few admissions from his adversary. Consequently, what a serjeant said might or might not correspond with the facts of the case. Those facts are in the knowledge of the party but not of his serjeant, unless he has seen fit to enlighten him. So when there is a chance that an alleged state of facts may be material to the decision of the case, the serjeant has to "get himself avowed," that is to say, procure a confirmation or denial by the party or his attorney of the statement made by the serjeant. The party therefore has the advantage of a second thought before he finally commits himself to the line of action proposed by the serjeant.

This then was the type of man who dominated both the bench and the bar at the time of Edward I's writ above mentioned. To this writ may be attributed the three results which are typical of the English profession: the bench controls the bar, the bar educates aspirants by a system of apprenticeship (later modified), and the bar calls those who are qualified to practise.

In the course of the fourteenth century the serjeants consolidated their position, becoming a close guild in complete control of the legal profession. Within their fraternity are united the bench and the leaders of the bar; the junior practitioners (who have developed out of the old class of apprentices) are outside the guild but under its supervision, and so too is the whole system of legal education. By the close of the fourteenth century the judges are all members of the order of serjeants, and serjeants alone can be heard in the principal court, that of Common Pleas. Their dignity increased with their emoluments, which must have been enormous; they ranked as knights and surrounded themselves with elaborate and costly ceremonial. The

creation of a serjeant obliged him to provide a feast comparable to a king's coronation, to distribute liveries and gold rings in profusion, and to maintain the proceedings for seven days. Their numbers were always low, as can be seen by the fact that every serjeant had his own pillar in St. Paul's Cathedral which served him as office and consultation room. The fact that apprentices were able to sustain these heavy charges and to become serjeants indicates that they too did not labor without reward. In the middle ages counsel conferred directly with their clients, and contracts for fees were enforceable in law. The serjeant's dress varied considerably at different dates, the most constant element being the coif, a close-fitting cap of white silk or linen fastened under the chin; hence the term "order of the coif" for the guild of serjeants. For the rest, they used on solemn occasions a long robe with short cape and hood which was party-colored, the left side and the right being of different colors. In later times they wore on ordinary occasions a red robe (somewhat like the present judges' scarlet robes, but without the fur), and later still, black. All these (like ecclesiastical and academic robes) were derived from what used to be the ordinary civilian dress in the middle ages. No part of English judicial costume is of ecclesiastical origin, as is sometimes erroneously stated.[1] In 1877 the order was dissolved, Serjeants' Inn sold, and the proceeds divided among the surviving members.

The history of the junior practitioners, or apprentices, is more complicated. The word "apprentice" did not mean merely a student, but rather a "junior;" it is clear that the apprentices had an important and lucrative practice. Their life centered in the Inns of Court which, like a university, provided for their general education and common life. Here they studied law and many other things,—history, music and dancing, for example,—and this full and fashionable education made the Inns a great resort for the youth of wealthy and noble families, even although they had no intention of practising law. In the beginning of the seventeenth century it was in the Middle Temple Hall before a very smart audience, including the Queen, that Shakespeare's play *Twelfth Night* first was performed. There were more than a dozen such inns, and during the fourteenth century the appren-

[1] The only reliable history of English official costume is to be found in the admirable article "Robes" in the *Encyclopædia Britannica* (11th edition).

tices changed their quarters many times, leasing first one inn, then another. In exactly the same way came into existence some of the halls at Oxford and Cambridge. It may be that these groups of apprentices formed round some senior master who headed their community and directed their studies, while the bench approved the arrangement and permitted the master to choose those whom he considered fit for call. The largest of these inns were Lincoln's Inn, Gray's Inn, the Middle Temple and the Inner Temple, but their early history is largely conjectural. Of the numerous smaller inns (which have not survived), even less is known with certainty. In time, the inns acquired a roughly uniform type of constitution; the benchers formed a governing body somewhat similar to the fellows of a college at Oxford or Cambridge, while the readers conducted an elaborate system of legal instruction. It was from among the readers that the serjeants were chosen. Next below the readers came the utter (or outer) barristers who were the most notable rank among the apprentices, and were privileged to argue in the mock trials or moots[1] which were staged for the instruction of the students. Below them were the inner barristers who soon are known simply as "students." There were also some professional attorneys, until in the later middle ages they were excluded from the Inns of Court. As numbers grew, subsidiary inns were formed subject to one or the other of the four great inns, and these were called Inns of Chancery; finally these Inns of Chancery were reserved for attorneys and solicitors only.

Coming to the seventeenth century, we find that numerous developments took place. The class of attorneys rapidly grew. The barrister always regarded the attorney as a superior sort of clerk; this was reasonable, for the attorneys were technically part of the clerical staff of the courts. For this reason, the attorneys were the more likely to be in contact with the client, receiving his instructions and only consulting a barrister when difficulties arose. Attorneys therefore did the bulk of the more straightforward conveyancing and drafting of pleadings, while the barristers acted as consulting experts. In this way, the attorney was actually the client of the barrister, rather than the

[1] The importance of these moot cases may be judged from the fact they sometimes appear in the old reports: see an example in Pound and Plucknett, *Readings*, 130.

layman, who had first engaged the attorney. The barrister asserted a social superiority by declining to sue for his fees (the rule appears in 1629–1630), although attorneys continued to do so. In the meanwhile, many students of the Inns of Court specialized in pleading and conveyancing and practised as members of new subdivisions of the legal profession as "pleaders," "equity draftsmen," and "conveyancers." There was no need for such men to be called to the bar, and as a rule they were not. They were therefore described as "practitioners under the bar;" generally they were members of an Inn of Court, however, and therefore subject to the inn's professional discipline. The attorneys, on the other hand, being thrust out of the Inns of Court, were in a difficult position, until about 1729 we find that a "Society of Gentlemen Practicers in the Courts of Law and Equity" was established for their government and protection, together with the solicitors.

The courts of equity—Chancery, Star Chamber, Court of Requests—were differently organized. The permanent clerical establishment of each of these courts undertook the duties of attorneys, and so professional attorneys had no place there. Still, there remained numerous duties of a quasi-legal character which had to be done, and litigants soon found it convenient to have a sort of law agent who would set the complicated machinery in motion by engaging and conferring with the various branches of the profession as occasion required, and doing other duties, sometimes of a legal and sometimes of a business character. These were the "solicitors." When they first appear in the fifteenth century they seem more business agents than lawyers, but by the seventeenth century they have won a place beside the attorneys and a recognized standing, especially as practising in courts of equity.

During the eighteenth century these various branches continued to exist side by side. An act of 1729, renewed in 1739, imposed regulations upon attorneys and solicitors, and formed the basis of future development. At the same time the act imposed rather heavy taxation upon these practitioners. By the nineteenth century, the solicitors gained a definite lead over the other branches of the profession, and although there are still a few conveyancers and pleaders licensed to practise, the profession for all intents and purposes in England now consists of two branches only, barristers and solicitors.

Sir Frederick Pollock has made an interesting suggestion that the development of the profession in the eighteenth century had been influenced by the fact that Roman Catholics were disqualified from practising at the bar. Instead of becoming barristers, therefore, Roman Catholics who took to the law practised as pleaders and particularly as conveyancers. A famous example is Charles Butler, and the last of a distinguished line of Catholic conveyancers was H. W. Challis, who died in 1898. Sir Frederick concludes:

"Whether their real property doctrine was at all colored by scholastic methods, I do not know. The probable influence of the Schoolmen on mediæval pleading has often been pointed out. In fact my late friend Mr. H. W. Challis, the most acute of recent real property lawyers and second to none in learning, was a disciple of Cardinal Newman's for some years. So there would seem to be some subtle affinity." [1]

Even at the present day the scale of costs to which solicitors are entitled is complicated and archaic, bearing striking witness to the fact that in origin the solicitors were more concerned with running errands and doing clerical work than with advising clients on general legal problems. By modern statutes solicitors have acquired the right of audience in the inferior courts.

Of the other branches of the legal profession below the bar the only one which survives is that of the notary, which in England is of slight importance, except for foreign and ecclesiastical matters. In 1884 it was stated that there were only forty-eight notaries in England.[2]

A few words must now be said upon the later developments which took place among the barristers. The exclusive right of audience which the serjeants enjoyed in the Court of Common Pleas was one of the causes of the attempts made by other courts, especially King's Bench and Exchequer, to enlarge their jurisdiction so that matters originally cognizable in the Common Pleas could be determined in these other courts without resort to the expensive services of a serjeant.[3] These attempts were highly successful and upon their success was built the development of the barristers' position.

1 1926 Journal of the Society of Public Teachers of Law, 38; with which compare 14 Law Quarterly Review, 219.

2 Christian, *Short History of Solicitors*, 226.

3 However, serjeants did at times appear in other courts than the Common Pleas.

Far from being merely an "apprentice," the barrister had now ample opportunities of practice in courts of equity and common law. The Crown itself began to offer dignified offices to barristers just as in earlier times certain serjeants, called King's serjeants, had enjoyed a pre-eminence in their order. All through the middle ages the Crown employed a considerable number of attorneys to watch the royal interests in the various courts, and about the year 1500 we find the appearance of a "solicitor" as well. From 1530 we find the custom of appointing the King's solicitor to succeed the King's attorney upon a vacancy in the latter office, and this is still the practice at the present day. At about the same date, moreover, instead of numerous royal attorneys, we find one attorney-general and one solicitor-general. These two officers soon began to extend their functions and acquired the position of general legal advisers to the government; in Elizabeth's reign we already find them elected members to the House of Commons (or else summoned to the House of Lords; occasionally both) in order to explain and defend the government's legal policy before the House. The rapid rise in importance of these officers is largely due to the fact that the mediæval King's serjeant was no longer big enough to cope with sixteenth-century conditions. The rise of new courts and the extension of the jurisdiction of old ones had far outgrown the limits within which the serjeant could act, and his ancient monopoly was now in fact an irksome restriction. It therefore became necessary to supplement the King's serjeants by the solicitor-general and attorney-general whose competence extended through all the courts. Then, too, the new officers had escaped the deep mediæval tinge which made the serjeants practically useless outside the field of real property law.

A single attorney-general and solicitor-general were, of course, unable to deal with the mass of business created by the sixteenth-century State, and it therefore became necessary for them to secure a more or less permanent staff of assistants. We therefore find the rise at the same time of the class of "King's Counsel Learned in the Law." These were barristers upon whose services the Crown had a prior claim, and their duties were largely to assist the attorney-general and solicitor-general when called upon. They ranked next below the serjeants in Elizabeth's reign and already had their proper place and precedence and seats upon the

woolsacks. It was Bacon who did a great deal to define the position of the King's Counsel and secured for it a life fee. By the close of the eighteenth century, however, the tendency was to regard the title of King's Counsel as merely a mark of distinction with purely nominal duties; and so it rests at the present day.[1]

Finally, the rapid rise of the order of barristers put an end to one other great privilege hitherto enjoyed by the serjeants. From Tudor times onwards the Crown abandoned the practice of choosing the judges exclusively from the ranks of the serjeants. For the future any barrister of distinction might be promoted to the bench, in which case he would take the degree of serjeant merely as a formality.

Amid all these changes, one thing remained constant, and that was the immense influence exercised by the judges, which was all the greater in view of the fact that before reaching the bench they had already achieved distinction at the bar, either as serjeants or barristers and King's Counsel. From one point of view quite a good deal of the history of the common law could be written in the form of a chronological series of biographies of the leading judges. Except in the cases of the comparatively small number of judges, such as Coke, whose life is a part of the general politics of the day, the actual biographical details are of little importance. Most legal careers run upon a regular pattern; student days, the call to the bar, the growth of practice, the tenure of public offices and the rise to the bench—all these follow in regular course in the lives of most of the great judges, and there is no point in trying to remember all these details. It is much more important to try to ascertain the peculiar gifts and qualities of each judge, and the incidents in his career which contributed to the formation of his character and mental outlook. In the light of all this it would become possible to evaluate his contributions to the law. Unfortunately not all of the judges have been blessed with biographers of sympathy and imagination. The rest of this chapter, therefore, will be devoted to biographical sketches of the principal common law judges. The Chancellors will be similarly treated when we deal with the history of equity.

In the twelfth century it is impossible to distinguish the law-

[1] There are numerous important details which in England differentiate the K. C. from his fellow barristers; these points have to be carefully considered before a barrister would feel justified in taking silk.

yer from the statesman and the politician; men such as Glanvill and Becket, Lanfranc and Hubert Walter, must have had considerable influence upon legal development, but still we can hardly describe them as lawyers. In the thirteenth century it is easier to recognize the beginning of the modern judiciary in the great judges Pateshull and Raleigh whose judgments were the inspiration of our first great law writer, Bracton. Martin de Pateshull was Archdeacon of Norfolk and Dean of St. Paul's; he became a Justice of the Bench in 1217 and was constantly employed upon judicial Eyres. So active was he that one of the justices, on behalf of himself and the distinguished Raleigh, complained to the King of the way in which Martin worked his colleagues from sunrise to sundown. When he died in 1229 he had gained the reputation (at least with Bracton) of being the finest lawyer in England.

William de Raleigh was rector of Bratton Fleming in Devon, which was perhaps the birthplace of Bracton himself. In any case one Odo de Bratton was his vicar. Raleigh began his legal career as clerk to the great Pateshull (and it is quite possible that young Henry de Bracton began in his turn as Raleigh's clerk). In 1228 he became a Justice of the Bench and in 1234 treasurer of Exeter Cathedral—of which Bracton was later to become Chancellor. In 1238 he was bishop-elect of Winchester but did not gain possession until 1244 owing to opposition from a rival candidate promoted by the King. He died in 1250. He seems to have been one of the most important promoters of the Statute of Merton from which we learn that he strongly supported the barons in their refusal to "change the laws of England" by adopting the canon law rule of legitimation by subsequent marriage. A cleric who held high ecclesiastic preferment could therefore take an independent view, and reconcile his orders with a nationalist outlook; because a man was a cleric it did not necessarily mean that he would favor the canon over the common law.

Of Bracton's life we shall speak later in discussing his book,[1] and so we come to the age of Edward I. Here we find the one great judicial scandal of English history (1289). Charges of corruption were investigated by a special commission headed by the Chancellor, Burnell. Lurid charges of all sorts of crimes,

[1] Below, p. 180.

from sorcery and murder downwards, were brought against various officials as well as the judges, and it is clear that the civil service came out worse than the judicial service. The Chief Justice of the Common Pleas fled the country; the Chief Justice of the King's Bench, the famous Ralf de Hengham, was found guilty of tampering with a record—later tradition says that he did it out of charity for a poor man—and paid a fine equivalent to twenty thousand dollars, which in those days was an enormous sum. Shortly afterwards, however, he was restored to favor and made Chief Justice of the Common Pleas. Tradition has it that the fine was used to build a clock tower at Westminster which remained until 1715. Like Bracton before him, he became Chancellor of Exeter Cathedral. At least once in Parliament he withstood the King to his face in the cause of justice.[1] And we shall mention later, he took a prominent share in drafting Edward I's legislation, notably the statute *De Donis*.

Most of the judges so far had been ecclesiastics, but from Edward II onwards the proportion of clergy on the bench tends to decline. The connection with the civil service is still close, and we find cases where the bench is used as a sort of honorable retirement for a civil servant.[2] We also begin to find, however, that the law becomes a profession and a career. There is a tendency to promote serjeants from the bar to the bench, and so we finally arrive at the period of professional justices who had a long training at the bar as preparation for their high office.

William de Bereford is a typical example of the new professional justice. Bereford became distinguished in the service of Edward I; yet it is remarkable to notice that immediately Edward II came to the throne he was well known to be an intimate friend of the notorious favorite Piers Gaveston. Indeed, he remained so constant to Gaveston that the baronial opposition demanded his banishment from the kingdom as one of the four men who had given the King evil counsel. At this critical moment his fortunes took a sudden and mysterious turn; instead of being banished, he was shortly afterwards promoted to succeed Hengham as Chief Justice of the Common Pleas (1309) and almost

1 2 Holdsworth, 546.

2 John Benstead, for example, after a long career as Keeper of the Wardrobe, became a Justice of the Common Pleas in 1309.

immediately the opposition adopted a formal vote of confidence in the new Chief Justice. By what feat of diplomacy this happy result was accomplished we are not told, but it is clear that the adroit Chief Justice enjoyed the fruits of his dexterity for the rest of his life. As a lawyer he stands out clearly among his fellows, and the *Year Books* of Edward II owe their peculiar flavor very largely to Bereford's presence. His character appears most vividly even after a lapse of six hundred years; his quick temper, his anti-clericalism, his refusal to allow formalities and even statutes to stand in the way of substantial justice, appear constantly. On many points his views were highly original and it is not uncommon to find him in a very select minority. He was certainly one of the greatest and one of the most influential judges of mediæval England. Although his career was almost entirely devoted to the law, like other judges he was occasionally employed upon diplomatic missions.

Of the great lawyers of the later fourteenth century it is interesting to note that three common lawyers became Chancellors, which is a useful reminder that the Chancery had as yet no distinct equitable jurisdiction in the modern sense of the words, but was rather a political post somewhat resembling that of Prime Minister. With the beginning of the fifteenth century we come to one justice who has achieved a fame in legend, Sir William Gascoign. Of him is told the famous story that the young Prince, afterwards Henry V, was charged before the Chief Justice and even offered violence to the court, whereupon Gascoign committed him to prison for contempt. The opinion of authorities is divided upon the authenticity of this story, the latest of them being content to present the authorities and to leave the question open.[1] Of the two other outstanding judges in the fifteenth century, Littleton and Fortescue, we shall say more in the next chapter.

The sixteenth century, although rich in legal changes, presents us no particularly striking figures on the bench until its close when in the last years of Elizabeth we find the rise of Sir Edward Coke. Born in 1552, he proceeded in due course to Trinity College, Cambridge, and in his later years became High Steward of the University. He entered the Inner Temple and was called to the bar in 1578. Owing to the influence of Burgh-

[1] Fox, *Contempt of Court*, 52, 53.

ley he rapidly rose in public office, became Recorder of London in 1591, Solicitor-General in 1592, Speaker of the House of Commons in 1593, and Attorney-General in 1594. By 1601 he had made an enormous fortune and entertained Queen Elizabeth in his house with great magnificence. In 1600 he began the publication of his Reports. In this early stage of his career, distinguished by his astonishingly rapid rise in the law and in politics (for it must be remembered that in his day a Speaker of the House of Commons was something like a modern Leader of the House), it is only natural that he should be full of enthusiasm for the Tudor conception of the State as expressed by Queen Elizabeth. Full of patriotism and national pride, Coke shared the feelings of others of his contemporaries who exalted the idea of the State, and displayed a violent hatred of Roman Catholics and political prisoners. Even contemporaries sometimes felt that he exaggerated a little, while his prosecution of Raleigh overstepped all bounds and was conspicuous among the State trials even at this period for its brutality. However, it must be remembered that Elizabeth's reign had often been seriously threatened by a combination of foreign and domestic intrigue, and Coke, as a member of the government, was well aware of these public dangers. During this period of his career he was naturally a firm supporter of the royal prerogative.

The peaceful accession of James I in 1603 must have surprised many contemporaries, for there had been widespread anxiety in Elizabeth's later years concerning the future after her decease. For a few years all went well. James seemed firmly seated on the throne and constantly proclaimed his adherence to the Tudor idea of government. In 1606 Coke became Chief Justice of the Common Pleas, and therefore high priest of the common law for whose mysteries he had an almost superstitious reverence. As so often happened in mediæval times (and Coke's mind was essentially mediæval), the attainment of a high office brought a change in his character and outlook. Just as the soldier and courtier, Thomas Becket, became transformed into a churchman of the sternest school on becoming Archbishop of Canterbury, so Coke, once the upholder of prerogative, discovered a new point of view from the bench at Westminster. Perhaps it was a tendency of his character to idealize whatever position he happened to be in: as a Crown lawyer he magnified the prerogative; as the

head of the common law system he exalted it to almost mystical heights. This meant a complete revision of his attitude towards the Crown, and there can be no doubt that many capable minds besides Coke, who were content to trust the Crown under Elizabeth, were equally likely to distrust it under James, whose previous record in Scotland was not reassuring. Coke now transferred to the common law, of which he was now the oracle, that supremacy and pre-eminence which he had ascribed to the Crown while he was Attorney-General. A line of decisions, of which *Bonham's Case* was a notable example, contained his new teaching.[1] From this time onwards he never lost an opportunity of declaring against the prerogative. His first quarrel was with the ecclesiastical courts, and especially the Court of High Commission. The prerogative was soon involved in this dispute, and Coke quoted Bracton's famous words that "the King is subject to God and the law" (that is to say, according to his enemies' interpretation, to Chief Justice Coke and the Court of Common Pleas), while in the *Case of Proclamations* (1611) Coke found yet another opportunity of attacking the prerogative. So far Coke had contrived to maintain his personal popularity. The Prince, afterwards Charles I, enjoyed his company because "he so mixed mirth with wisdom," and the youthful enthusiasm which runs through all his writings, and his undoubted sincerity, still further contributed to his popularity, while according to the fashion of the times he was fond of splendid attire, "delighting in good clothes, well worn, and being wont to say that the outward neatness of our bodies might be a monitor of purity to our souls." Consequently, although he gave constant cause of annoyance to the King, yet for a long time the court party was prepared to tolerate him. Indeed, Coke's position as the champion of the supremacy of the common law was extremely strong, for it certainly represented public feeling based upon centuries of mediaeval thought which had always looked to law rather than to the State. Proposals were soon made that Coke should be removed to some other sphere of activity, finance for example, in which he was reputed to be skilled, and finally on the advice of Bacon, who was now entering upon a career of open rivalry with

[1] His views are discussed above, pp. 50, 51.

Coke, the latter was promoted to the less important but more dignified position of Chief Justice of the King's Bench (1613).

The contrast between Coke and Bacon was as great as could possibly be imagined. As a scientist and a philosopher Bacon was laying the foundations of the modern scientific method, which to Coke was completely incomprehensible and only evoked satirical couplets. Bacon was a whole-hearted supporter of the Crown, and perhaps thought that Coke might be brought back to his early views if he were given one more change of office. But by this time Coke had decided not to change again. From the King's Bench Coke issued writs of prohibition to the Court of Chancery, thus opening a general attack upon equity. From 1617 to 1621 Bacon held the Great Seal and the two protagonists were now fairly ranged one against the other. Coke, whose domestic affairs (in which Bacon also was involved) grew steadily more disastrous, now endeavored to use his daughter, a child of fourteen, to consolidate his position at court by marrying her to the brother of the reigning favorite, Lord Buckingham. Lady Coke objected and the girl eloped, and Bacon no doubt enjoyed the opportunity of filing an information against Coke in the Star Chamber. At the same time Coke was at last dismissed from office in 1616. He now entered Parliament and began the third epoch of his career as leader of the parliamentary opposition (1621). This time he got his revenge upon Bacon, for he was one of the managers of his impeachment, and from now onwards he was prominent in all the activities of the opposition. In 1622 he was put in the Tower for several months and his papers confiscated.

In 1625 James I was succeeded by his son, Charles I, and Coke was soon identified with the opposition's policy of restricting supplies. The next year he was nominated sheriff (which was a compulsory office and conveniently disqualified the holder from sitting in Parliament, as he himself had once decided from the bench). These last years of his life (he was now seventy-seven) he devoted to preparing his manuscripts for the press. In 1628 he was again returned to Parliament, receiving the striking distinction of election in two different counties. By this time the Crown had attempted a variety of methods for obtaining money, and after much discussion in the Commons, Coke's suggestion of presenting a Petition of Right was adopted, to which Charles in

the end had to give his assent. This was beyond doubt the crown of Coke's career. After six years of retirement he died in 1634, and immediately his manuscripts (including his will upon which he had spent many years of learned care) were seized, and it would seem destroyed. Of his political theory we have already spoken,[1] and of his writings something will be said in the next chapter. His general influence upon the course of English law was to maintain continuity between modern and mediæval times, and this achievement had vices as well as virtues. But, most important of all, he preserved the fabric of the common law, and in his judgments began the tendency towards bringing it into harmony with more modern needs. It is unfortunate that his mediæval foundation made it necessary to advance by way of increasing complexity instead of simplification. Yet even here Coke's mediæval learning had such an air of finality about it that further recourse to mediæval law was not so necessary, and it became more and more the tendency to take Coke's word on matters of *Year Book* learning.

Of Chief Justice Hale, and of John Selden (who never held legal office), we shall speak more at length in describing legal literature; and so we pass to the Restoration which saw the rise to prominence of Sir John Holt. His father was a serjeant and Recorder of Reading. His youth at Oxford University was no doubt lively, and tradition has it that he was the only member of his set who did not end on the gallows. At the age of ten his name was already put upon the books of Gray's Inn and at twenty-one he was called to the Bar (1663). It was only after some ten years that Holt became prominent. In 1679 he defended Lord Danby in his impeachment; he was also counsel for Lord Russell and appeared for the East India Company in support of the royal grant of monopoly. In 1686 he became Recorder of London, was knighted and became a King's serjeant, but he soon resigned the recordership rather than pass sentence of death upon a soldier who had deserted the Army in time of peace. When James II left the kingdom, Sir John Holt took a prominent part in finding a formula which would express the revolution in terms of constitutional law. He was immediately appointed Lord Chief Justice of the King's Bench, where many notable cases came be-

[1] Above, p. 53.

fore him, for by this time the King's Bench had become more important than the Common Pleas. Holt declined the Great Seal under the excuse that he was not an equity lawyer. He retired from the bench in 1710 and died shortly after. In politics he gave mortal offence to James II by resigning the recordership, and so he naturally maintained the revolution settlement which he had helped to formulate. As an advocate his early training under Hale had made him a sound lawyer with a contempt for trickery, while as a judge he restored the credit of the bench after the evil days of Charles II and James II. In the field of constitutional law he resisted innovation on all sides; if he took a firm stand against the excesses of martial law, he was also ready to defend the dispensing power of the Crown, and resisted an extreme claim of privilege by the House of Lords, which for a moment proposed to commit the Chief Justice for contempt. In the Aylesbury Election Case (*Ashby* v. *White*[1]) Holt held that although the plaintiff had suffered no loss in consequence of the constables refusing to allow him to vote, yet he had a good cause of action on the principle that every right has a remedy—and this in spite of some pretension by the House of Commons to make it a question of privilege. In the *Bankers' Case*[2] he and his fellow justices held that a petition of right lay against the Crown for damages on breach of contract. It is interesting to note that he several times anticipated Lord Mansfield's decision in *Summersett's Case* holding that one could not be a slave on English soil.[3] In another case he laid down the rule that land which is colonized by English settlers is thereby subject to English law, while land which is conquered retains its own laws until further order.[4] In private law he laid the foundation of modern commercial law. Coke had already stated the claim of the common law courts to entertain mercantile cases, but a great practical advance was made when Holt adopted the policy of deciding such cases in the light of mercantile custom instead of by the strict rules of the common law, which were, indeed, entirely unsuitable as a basis of commercial law. Like Lord Mansfield after

1 2 Ld. Raym. 938 (1703).

2 14 S. T. 1 (1700).

3 *Smith* v. *Brown* (1705), 2 Salk. 666; *Chamberlain* v. *Harvey* (1677) 1 Ld. Raym. 146.

4 *Blankard* v. *Galdy* (1693), 2 Salk. 411; *Smith* v. *Brown*, 2 Salk. 666.

him, he readily accepted evidence of mercantile custom and consulted merchants freely upon the matter. He tells us that once when he had to decide whether a bill could be accepted after it was due he invited all the eminent merchants in London to discuss the matter with him.[1] He has also given us an early decision upon an employer's liability for the acts of his servants done in the course of their employment.[2] He dissented, however, from a decision that the Postmaster-General is not liable for packets lost in the post.[3] Another of his decisions on master and servant has a less modern sound: "If a master gives correction to his servant it ought to be with the proper instrument, as a cudgel, etc. And then if by accident a blow gives death this would be but manslaughter. The same law of a schoolmaster. But a sword is not a proper instrument for correction."[4] Unlike most of his predecessors he was willing to favor the action of slander. The most famous of all his decisions is, of course, *Coggs* v. *Bernard* (1705),[5] which is an elaborate treatment of the general principles of the law of bailments, based upon a Romanesque passage in Bracton. As Lord Birkenhead has observed, "throughout all branches of law one may still cite judgments delivered by Holt."[6] As a criminal judge he had enormous influence in changing the tone of the courts. In trials for treason he atoned for the legal disabilities under which prisoners were then placed by treating them with great patience and indulgence; he even allowed Lord Preston to address the jury in his defence after his own summing up, and he discontinued the practice of bringing prisoners into court in chains. It was an old theory that prisoners tried for felony needed no counsel, for the judge was their defender; Holt lived up to the letter of the rule. As Sir Richard Steele wrote in the *Tattler:*

"Wherever he was judge he never forgot that he was also counsel. The criminal before him was always sure he stood before his country, and, in a sort, the parent of it. The prisoner knew that though his spirit was broken with guilt and incapable of language to defend itself,

[1] *Mutford* v. *Walcot* (1700), 1 Ld. Raym. 574.
[2] *Turberville* v. *Stampe* (1697), 1 Ld. Raym. 264.
[3] *Lane* v. *Cotton* (1701), 1 Ld. Raym. 646.
[4] *R.* v. *Keite* (1697), 1 Ld. Raym. 138.
[5] 2 Ld. Raym. 909; for some extracts see Pound and Plucknett, *Readings*, 593–601.
[6] Birkenhead, *Fourteen English Judges*, 116.

all would be gathered from him which could conduce to his safety; and that his judge would wrest no law to destroy him, nor conceal any that would save him." [1]

One notable piece of legislation has been ascribed to his influence. This was the Statute 3 & 4 Anne, c. 9, which made promissory notes negotiable, for when the point was raised before him in a case Lord Holt would not venture to make so great a departure.[2] He therefore felt compelled as the law then stood to hold that notes were not negotiable, using his influence with the legislature to make the necessary reform.

William Murray, first Earl of Mansfield, was the fourth son of Lord Stormont, a Scotch peer of distinguished lineage but slender fortune. He was educated at Oxford, being intended first for the Church, but a friend afterwards assisted him in preparing for the law. His family were staunch Jacobites and all through his career his enemies were ready to reproach him, no doubt unjustly, with only a half-hearted devotion to the House of Hanover. At Oxford and soon afterwards, Murray made the acquaintance of the principal wits of the time, including the poet Alexander Pope, before whom and a looking-glass he practised eloquence. His reputation as a man of culture was so high that even Dr. Johnson (who had a deep-rooted prejudice against Scots) was bound to admit that one could do a lot with a Scot if he were caught young enough. The most significant event in his career at Oxford was his winning a prize for Latin verse against William Pitt, afterwards Earl of Chatham, for here began a bitter rivalry which lasted all their lives. Being a Scotchman, Murray was soon able to acquire a good deal of Scotch business, both legal and political. As early as 1733 he argued a Scotch case before the House of Lords. In 1742 he became Solicitor-General, entered the House of Commons, and immediately became the most brilliant defender of the government in the House, withstanding single-handedly the fierce attacks of Pitt. In spite of his supposed Jacobite sympathies he prosecuted the Jacobite lords who had been concerned with the Rebellion of 1745. Notwithstanding Pitt's incessant attacks, Murray continued his successful defence of the government; in 1754 he became Attorney-General, but in 1756 he insisted upon leaving the House of Commons to

1 Quoted in 6 Holdsworth, 519.

2 *Clerke* v. *Martin* (1702), 2 Ld. Raym. 757.

become Lord Chief Justice of the King's Bench, and was created Baron Mansfield. In the House of Lords he continued to take an active part in politics. He opposed the repeal of the Stamp Act by Lord Rockingham, taking on this and some other constitutional questions a somewhat narrow view. On the bench he inevitably incurred some unpopularity in connection with the cases in which Wilkes was involved, and was bitterly assailed by the anonymous Junius. His rulings in several libel actions to the effect that the jury had no right to pass upon anything except the facts of authorship and publication increased his unpopularity, although there is little doubt that his view of the law was correct until the passing of Fox's Libel Act.[1] On the other hand, in 1771 he decided the famous *Summersett's Case* in favor of a slave. In 1774 he decided that the Crown had no right to legislate for conquered countries merely by prerogative in such a way as to contravene the usual principles of constitutional law. In 1776 he received an earldom, and soon took less part in politics. In 1778 when it was known that he supported a bill which would have relieved Roman Catholics his house was burnt in the course of the Gordon riots. Lord Chatham, who had followed him in the Lords, died in 1778, and Mansfield absented himself from the funeral and refused to join in the acts of mourning for his late rival. In 1784 he himself retired from politics, and in 1788 resigned from the bench to devote the rest of his days to society and letters. In 1793 at the age of eighty-eight he died and was buried in Westminster Abbey.

As an orator in Parliament he was second only to Pitt, with whose thunderous style Mansfield's own quiet and elegant manner was in striking contrast. At the bar the same gift enabled him to present his case and his arguments with winning lucidity. On the bench he acquired a reputation for complete impartiality, long patience and a profound understanding of legal problems. To these advantages he added the study of somewhat unusual subjects for lawyers of his day. His old master Denison had taught him special pleading and conveyancing on black-letter lines, but at the same time Mansfield felt more attracted by the cosmopolitan learning of Bracton, and under his influence was drawn (like Holt before him) to a study of Roman law and of

[1] Above, p. 117.

the French commercial code which at that moment was the best body of mercantile law in existence. His interest in commerce was deep; a generation before it was fashionable he had adopted free trade principles, and among his many claims to fame his commercial decisions are perhaps the most imposing. It is impossible here to enumerate all the really important decisions which Mansfield made; we must be content with reproducing two estimates of his work. In one of them Professor Holdsworth examines Mansfield's place in the legal controversies of his time:

"Lord Mansfield was a Scotchman by birth, but he was educated at Westminster and Oxford, and he was a barrister of Lincoln's Inn. He had kept up some connection with Scotland and Scotch law, so that both his birth and his education, as well as the qualities of his mind, tended to make him a jurist learned in Roman and continental law as well as in English law. The breadth of his learning prevented him from attaining that accurate knowledge of the development of common law rules which could only come to an English lawyer who had devoted the largest part of his time to the study of its complex technicalities. He approached the common law from the viewpoint of a student of the broad principles of jurisprudence, not from the viewpoint of a student of the evolution of its rules. These qualities of his mind fitted him admirably for the work of creating and settling the law merchant, which in England was in a backward and unsettled state. They enabled him also to rationalize and liberalize other branches of the common law, notably quasi-contract and estoppel, by an infusion of broad and equitable principles. But, naturally, the continued exercise of these qualities tended to make him think that he could settle on rational principles all the branches of the common law. This was a mistake. The principles of some of the older branches of that law were too well settled to be thus reformed. The ground was covered by authority; and the authorities could be understood aright only by lawyers who had studied their history and development. An attempt to rationalize these branches of the common law by the help of pure reason and foreign analogies could not succeed, because the principles founded on this basis could be proved to be contrary to ascertained principles of the common law. Thus Lord Mansfield's attempts to recast the doctrine of consideration, to restate the rule in *Shelley's Case*, and to make the court of King's Bench a court of equity as well as a court of law met the same fate as [his] attempt to extend the doctrine of disseisin at election." [1]

In the other Lord Birkenhead, setting aside those things which Mansfield failed to achieve, estimates his place in legal development in these words:[2]

1 7 Holdsworth, 44, 45.

2 Birkenhead, *Fourteen English Judges*, 186. Compare the words of Lord Campbell, quoted in Pound and Plucknett, *Readings*, 223–226.

"It was first and foremost his work in developing and explaining the commercial law that has ensured him a foremost place among English judges. His practice was to try such cases at the Guildhall with a jury. The panel was chosen with great care from among the merchants of the city, to whom there was no greater source of pride than to become "Lord Mansfield's jurymen." He invited them to dine with him frequently, and enquired minutely into the practice of reputable merchants, in return explaining to them with the greatest care the principles of law. When a case arose which involved a point of principle or some novel practice, he was accustomed to take their verdict subject to a case for the opinion of the full court. He was aware that such a practice might cause undue delays, and was therefore careful to draw the case at once and see that it was signed by counsel, before calling on another case. He made it an invariable condition that the case was set down for argument in the first four days of the next law term. In this way he examined, restated, or created the whole of the law of merchants. His long career and deserved reputation have somewhat obscured the work of his predecessors, especially Holt, who in many instances will be found to have decided the same point the same way. No judge can be a complete innovator. He is one of a long procession of fellow workers, and undue prominence given to one may obscure the merits of another. Nevertheless, Holt could not have done Mansfield's work. He lived too soon, but he did noble work on the foundations of which Mansfield built the commanding fabric of our commercial law. The law relating to shipping, commercial transactions, and insurance was practically remade by Mansfield, who never lost sight of the fact that international commerce requires the law of each country to be based on the same principles: the practice of honesty and fair dealing among prudent and honourable merchants. Coke captured the law merchant for the common law; Holt retained it; Mansfield formally incorporated it into our system."

CHAPTER VII

PROFESSIONAL LITERATURE

"Legal precepts and legal institutions are far from being all with which we have to do. Indeed, in the everyday administration of justice, along with legal precepts, the traditional art of the lawyer's craft—the traditional mode of selecting, developing, and applying the received legal materials, the traditional technique of finding the grounds of decision in those materials and of developing them into a judgment—is a factor of no less importance. That art, and a certain body of received ideals as to the end of law and what legal precepts should be in view thereof, are in truth much more enduring than legal precepts. They give unity and continuity to legal development. They make the lawyers of to-day conscious of kinship with the lawyers of the sixteenth century, and even with the great lawyers of the middle Ages, and give us a sense of continuity from the *Year Books* to the present, which would have little warrant if we looked only at institutions and at legal precepts. They give unity to the law of English-speaking peoples throughout the world. For, diverse as the social, economic, political, and physical conditions may be, diverse as legislation may be, far as statute or judicial decision may have departed from the common legal materials of the seventeenth century, and divergent as the paths of departure may be, the lawyers in England, the United States, Canada, and Australia feel that they live under what is essentially one legal system, and each knows at once how to make use of the other's law. An American lawyer uses recent English or Canadian or Australian decisions with entire assurance because they are made to be used as he knows how to use them. The American legislator knows, as it were instinctively, how to adapt English or Canadian or Australian legislation because it has been drawn to be used as he knows how to use it. The traditional art of applying it, and of developing it into grounds of decision of particular controversies, is familiar to him. On the other hand, when the American lawyer seeks to use the legal materials of the Roman law or of the modern Roman-law world, he proceeds blunderingly and with a certain consciousness of helplessness. For these materials took shape for a wholly different technique. The traditional art of developing grounds of decision from them and applying them is very different from our own, and they are adapted to that technique. Ours is a technique of utilizing recorded judicial experience. The civilian's is a technique of finding his grounds of decision in written texts. Even when we have written texts, as an American constitutional law, we proceed at once to look at them through the spectacles of the common law, and our method is not one of development of the text

but of development of judicially found grounds of decision which, if they began in the text, have since led an independent existence." [1]

The words we have just quoted clearly define the point of view from which historical sources are best studied. It is, of course, necessary that the would-be legal historian should know what sources are available and should understand their value and their use. But the study of the sources of legal history has a wider and more general significance. Besides being the sources which the modern historian uses in reconstructing the past, these sources were also the tools in daily use by ancient lawyers. It was by the constant use of the reports, registers, pamphlets and other works which we shall mention that the lawyers of former days gained their living, and, as in every other human creation, the peculiarities of the tools employed have left a permanent mark upon the finished product. A system of law therefore is largely conditioned by the technical methods used by the lawyers in going about their daily business. When faced with a difficult case, the advocates and the judges have to undertake research in order to find what law will govern it. The method which they pursue, the character of the books and sources which they use, and the attitude of mind with which they approach them all have their influence upon the shaping of the law, and upon their conception of law itself. Even in our own day the enterprise of law publishers in reporting and making available thousands upon thousands of cases every year is showing signs of influencing the modern conception of law in this country. First there is an heroic attempt to keep pace with the mass of material pouring from the presses, which is soon followed by an inevitable reaction, and a change in attitude towards case law. It is, of course, perfectly true that to some extent legal literature is the product of the professional point of view; but it is even more important to observe that a particular type of legal literature when it has come into constant and widespread use exerts very considerable influence upon legal thought. By the words "legal thought," moreover, we do not merely mean the deliberate reflections of the specialist in jurisprudence: such speculations are occasionally influential, but quite frequently they do not extend outside of academic circles. A more important part

[1] Pound, Introduction to Winfield, *Chief Sources of English Legal History*, xiii, xiv.

of legal thought is the half-conscious formation of ideas which is bound to go on in the mind of every active practitioner. It was the same in the middle ages. If we are to understand the point of view of the founders of the common law these questions—

> "must be approached from the point of view of the royal judge and the pleader. The one was a hard-worked and underpaid official, the other a busy professional man intent on winning cases and learning the practical wisdom of the courts. Neither class was in any sense of an academical turn of mind, and theories as such seem to have played little part in their thinking. Yet with such men one often finds that an unexpressed, half-conscious notion or prejudice is extremely influential, and, indeed, it is mainly to such factors as this that one must look for an explanation of the attitude of court and pleaders." [1]

It is only natural that it should be more difficult to catch the turn of thought of people whose thoughts are only half expressed, than it is to follow the argument of a jurist who is deliberately expounding his speculations. In the former case we have to search for the thought as well as we can among the daily practical affairs of the old lawyers; in the latter we have merely to read attentively a carefully written exposition. Yet, as everybody knows, the ideas which most powerfully influence conduct in every department of life are not the ideas of a systematic philosophy deliberately held, but rather the vague notions and unconscious prejudices, habits of mind, and so forth, of which we are for the most part unaware. Such notions are partly the cause, but more frequently the effect, of the legal literature which one habitually uses, and the principal object of this chapter will be to trace the relationship of the law to professional literature from this point of view.

If we begin with the Anglo-Saxon period we shall find a fair number of sources for legal history, but very few of these are what we would call professional literature. As we have seen, it is hardly possible to speak of a legal profession in the Anglo-Saxon period. The sources which have survived are for the most part formal documents. The laws, or the declarations of law, made by the Anglo-Saxon kings, have survived in considerable numbers and have been published in an edition which is a monument of patient learning and keen textual criticism.[2] In the

1 Plucknett, *Statutes and Their Interpretation in the Fourteenth Century*, 7.
2 Liebermann, *Die Gesetze der Angelsachsen*.

matter of form hardly anything can be deduced save a general similarity in method (or lack of method) with various continental collections.[1] Perhaps the one great difference—namely, that the Anglo-Saxon laws are written in English while the continental collections are in Latin instead of in the vernacular—is more obvious than important; the spirit in both cases seems the same. In the case of the charters, on the other hand, matters of form are more illuminating. It was the object of the charters in most cases to make bookland, and for this purpose they used forms and expressions which can definitely be traced to the continent. This constitutes one of the main arguments used by Sir Paul Vinogradoff in establishing Roman influence upon Anglo-Saxon law.[2] To this extent no doubt the forms of of the Anglo-Saxon charters indicate the direction in which Anglo-Saxon thought was searching for a professional technique. It seems, moreover, that these documents were not drafted in the royal Chancery (at least until comparatively late) but were prepared by the recipient who presented them to the donor in the hope that he would execute them. There is, therefore, a good deal of room for the exercise of fancy in their construction. Many of them bear a distinctly literary character; elegance, latinity and rhetoric all enter into the Anglo-Saxon charter. The few slight productions which might be called legal treatises which come from the Anglo-Saxon age are few and short. In form they consist of the brief statement of a few rules, usually matters of detail which might be apt, otherwise, to slip from the memory.

It is not until the Norman age has made some progress that we begin to find a definitely professional literature in the modern sense of the term. As it proceeds we find at the opening of the thirteenth century several very important series of public records consisting of the rolls of the several courts and administrative departments. These are highly important as sources for legal history, but it is only very much later that they become in any sense a product of the profession. The steps by which this took place seem never to have been fully explored. In their early days, no doubt, these rolls of the King's Courts were prepared

[1] They are briefly described in 1 *P. and M.* 6 13, and 2 Holdsworth, 18–34.

[2] See his *Romanistische Einflüsse im Angelsächsischen Recht: Das Buchland*, in his *Collected Papers*, i 168–191.

by royal officials for strictly practical purposes.[1] They are hasty, rapidly written, full of slips and interlineations. There is an air of informality about them which seems to show that they were taken down in court as cases proceeded, and never revised. If, however, we look at a plea roll of the fourteenth century or later a great change has taken place. Pleadings are set forth in formal language and written in a large set hand. Subsidiary notes are commonly made in very hasty writing, but the formal record always appears in precise phrases and careful writing. At some time or another the responsibility for drafting these records seems to have shifted. In the earlier rolls it is clear that the clerk recorded any matter of interest to the Crown, and this without consulting the parties, who very probably did not have access to the rolls. By the time we reach the classical age of the common law, it seems to have become the practice for the lawyers engaged upon a case to settle the pleadings and the form in which they should appear upon the plea roll. From this point, therefore, the enrollment is not merely an administrative document for the confidential use of the royal officials, but a document drawn by lawyers in accordance with the learning of their art, and therefore a form of professional literature.[2]

Besides the pleadings themselves the writ has also undergone a somewhat similar development. In the early Norman age a party who was fortunate enough to obtain a royal writ against his adversary was probably uncertain of the form which that writ would take. In substance it was merely a command from the King to a sheriff in connection with the matter, and might contain any orders which the King thought appropriate. Gradually a few forms became more and more commonly in use, and it was obviously convenient that the public as well as the clerical staff of the Chancery should know the more common forms available. And so we find collections of forms of writs, at first very small, and later growing to formidable dimensions. With the writs, as with the pleadings, the responsibility for drafting them gradually shifts from the royal officials to the legal profession at

1 Changes in the appearance of legal records can be traced through the plates in Johnson and Jenkinson, *English Court Hand*, and Jenkinson, *Later Court Hands*.

2 On the date at which the verbal conversation of the serjeants in court is replaced by the exchange of written pleadings, see 3 Holdsworth, 639–656.

large, and so they too pass from the category of administrative documents into that of professional literature. Then, outside of all this, there is a thin stream of treatises which attempt with more or less success a systematic exposition of the law or of some part of it.

Such, then, is the general character of the development of legal literature in its earlier days. The preparation of documents which was once the private concern of the King's officials gradually passed from the administration to the legal profession, who exercised it subject to criticism by the courts. As we shall soon see, even the treatises owe a great deal to this process.

In the middle of the reign of Henry I between the years 1113 and 1118 we get the first outburst of legal writing in England. A little group of treatises attempted to state the old Anglo-Saxon law in a form suitable for the Norman age. Several of these treatises are closely connected, and may perhaps come from the same hand. Most important of them is the *Leges Henrici Primi*. It seems to have obtained this title because it commences with the coronation charter of Henry I; the rest of the book, in fact, is drawn mainly from the Anglo-Saxon laws with some references to civil, canon and Frankish law. The author suffered under the disability of writing a very bad Latin style and his meaning is often far from clear; but in spite of all his limitations Maitland insists "that he was engaged on an utterly new task; he was writing a legal text book, a text book of law that was neither Roman nor canon law. To have thought that a law book ought to be written was no small feat in 1118." The legal situation in Henry I's reign was largely also a political question, and a remarkable trace of the political and racial controversy which must have been going on is to be found in a book called the *Laws of Edward the Confessor*. The anti-Norman element in England naturally looked back to the days of the Confessor as the Golden Age of English law, and the author, or rather forger, of this text, endeavored to show the good old law which in his opinion ought to prevail. He is a staunch upholder of West Saxon institutions and of the Church; his principal antipathy is for the Danes. Unfortunately Coke and all the older historians took this book seriously, and so a good deal of legend came to pass as history.

Two generations later we come to another outburst of legal writing. The *Dialogue of the Exchequer* we have already men-

tioned;[1] at almost the same date we find another treatise which is more exclusively concerned with law. This book goes by the name of *Glanvill*. It is highly significant that in or about the year 1187 it should have been possible to write two separate treatises, one about administration, and the other about law: already these two subjects have their separate spheres. There is no reason to believe that Ranulph de Glanvill wrote this book, although he may have inspired Hubert Walter to compose it: the manuscripts merely say that it was composed in the time of Glanvill. The high importance of this work lies in the fact that it settled the method of legal writing for many centuries to come. This method consists in giving a specimen form of writ current in the King's Court and adding to it a commentary. In Glanvill's day the writs were not very numerous and the law attached to them was not very complicated. The King's Court was as yet young and its jurisdiction was not very extensive. Besides the law of land and the feudal incidents attached to it, there was not very much to be said, nor was it felt desirable to extend the jurisdiction of the King's Court to other matters. Glanvill's treatise, therefore, is not very long or very difficult. The contrast between *Glanvill* and the *Leges Henrici Primi* is very marked. The author of the older book is overcome by the confusion of competing systems of law, none of which alone was adequate. Even in England he had to recognize three territorial laws, the Dane Law, the Law of Mercia and the Law of Wessex, but in order to make sense out of them he had to appeal to Roman, canon and Frankish law. When we come to Glanvill everything is beautifully simple. He is only concerned with the law of the King's Court: all the tangled masses of local custom which certainly were still in force, he completely ignores; most of the surviving traces of pre-conquest law are likewise absent from his work. He is, in fact, the first exponent of the new common law which in the course of the centuries was to supersede the ancient legal institutions of the land. Already we can see the main features of that common law in Glanvill's book; it is royal, flowing from the King's Court; it is common, for local variations receive very little sympathy; it is strongly procedural, being based upon writs and expressed in the form of a commentary upon them.

1 Above, pp. 26, 126, 127.

After another interval of two generations we come to "the flower and crown of English jurisprudence"—Bracton. Of Bracton's life we know a good deal of insignificant detail; of the really important matters in his career we have very little information. He seems to be of Devonshire origin and held a great deal of preferment in the Church, finally becoming Chancellor of Exeter Cathedral. He spent many years in the royal service principally as a Judge of Assize, constantly visiting his own county of Devonshire in that capacity. He seems never to have sat in the Court of Common Pleas although for a short time he was a Justice in Eyre and of the King's Bench. Although he was constantly in the government's service we find little trace of his taking a side during the Barons' War. It is, in fact, impossible to regard him as a partisan, for he served both the barons and the King. It has been suggested that we have here an early example of the sound judicial policy of remaining absolutely neutral in times of political strife. His great book was never finished, for he seems to have stopped working upon it in 1256; the civil war which soon followed may well have prevented further study. The treatise consists of two distinct parts. The first quarter is a somewhat lengthy introduction; the rest is a series of separate treatises upon the various forms of action. The second and main portion of his work is based on the original plan of Glanvill, that is to say, each form of action is treated separately in the form of a commentary upon the appropriate writ. But Bracton does a good deal more than use Glanvill's plan and merely bring his matter up to date by the inclusion of vast masses of new law developed since Glanvill's day. He made, in fact, two capital contributions of his own to the art of legal writing. First of all, besides studying the form of the original writs, he also introduced complete transcripts of the pleadings in selected cases. This great innovation gives to his work in several places a curiously modern air, for like modern law writers he sometimes praises and sometimes criticizes his cases. At the beginning of his book he explains, however, that the contemporary bench is not distinguished by ability or learning, and that his treatise is, to some extent, a protest against modern tendencies. He endeavors to set forth the sound principles laid down by those whom he calls "his masters" who were on the bench nearly a generation ago; hence it is that his cases are on the average about twenty years older than his

book. Of really recent cases he used very few. It must not, therefore, be assumed that we have in Bracton the modern conception of case law. He never gives us any discussion of the authority of cases and clearly would not understand the modern implications of *stare decisis*. Indeed, his cases are carefully selected because they illustrate what he believes the law ought to be, and not because they have any binding authority; he freely admits that at the present moment decisions are apt to be on different lines. Bracton's use of cases, therefore, is not based upon their authority as sources of law, but upon his personal respect for the judges who decided them, and his belief that they raise and discuss questions upon lines which he considers sound.[1] Although it is true that the use of cases as a source of law in the modern sense was still far in the future, nevertheless Bracton's use of cases is very significant. He accustomed lawyers of the thirteenth and early fourteenth centuries to read and to discuss the cases which he put in his book, and this was a great step towards the modern point of view. It may be that Bracton's priority in this matter can be regarded as established. He is certainly very soon followed by little treatises or pamphlets which also contain transcripts of records, but unlike Bracton these later little treatises have either suppressed the names of the parties or have contented themselves with an imaginary rather than an actual record. As for Bracton, it was only his official position and his family connections which enabled him to obtain access to the rolls of the King's Courts. The ordinary lawyer at this time would certainly not have been able to spend years of study upon these official and confidential documents. It is still possible to trace the stages of Bracton's work, for a notebook has been discovered by Sir Paul Vinogradoff and edited by Maitland which contains his transcripts of some two thousand cases from the plea rolls. Most of those plea rolls still survive and in their margins are still to be seen the pencil directions which Bracton wrote for his copyist. It may be that Bracton's work was never completed in consequence of an order which we know he received demanding the instant return of all plea rolls in his possession. Even for a judge such as Bracton access to cases on the plea rolls was therefore difficult, and there is no possibility of any

[1] See further, p. 304 below.

system of case law developing when the cases are inaccessible to the profession. We may conjecture, however, that Bracton's use of cases was favorably received by the profession; the small tracts we have just mentioned which contain either records of cases or drafts of imaginary records bear witness to this fact. It may well be that Bracton's discussion of cases so impressed lawyers at the time that there was a real demand for case material, especially after Bracton's treatise began to grow old. Such a demand might have been met in a variety of ways; on the continent it was not unusual for a clerk of the courts to prepare a collection of interesting cases from the documents in his custody, but in England a different policy was adopted. It is, perhaps, not too fanciful to suggest that Bracton's use of cases gave the first impetus towards the preparation of the *Year Books*.

The second contribution which Bracton made was to overspread the technicalities of the English courts with a broad cosmopolitan learning. His use of foreign material, and especially of Roman law, may well be compared with the Romanism of such treatises as the *Leges Henrici Primi* of a hundred and fifty years before, and with the few passages where Glanvill also drew upon Roman sources. There has been a great deal of controversy as to the extent and the character of Bracton's Romanism. To some he has seemed so completely Roman that he must be denied a place in the literature of English law; Sir Henry Maine regarded him as something like an inexplicable fraud in passing off sheer Romanism as English law. Maitland believed that the extent of Bracton's Romanism was not considerable and that his knowledge of Roman law was neither accurate nor deep. To all this it has been replied by Sir Paul Vinogradoff that Bracton's Roman law must not be tested by the Digest but by the somewhat Romanized customs in force on the continent. Judged from this standpoint Maitland's charges of mishandling Roman law break down, for Bracton was using Roman law in the popular form in which it was then current, rather than in the academic purity of the Digest. We may probably assume, therefore, that when Bracton used foreign law he had a fairly good idea of what he was about.

It is interesting to note the places where Bracton's Romanism occurs. It is most apparent in the earlier portion of his work, which consists very largely of general considerations serving as

an introduction to the subject.[1] The identification of these Romanesque passages and the discussion of their significance are by no means easy, and a good deal of controversy has resulted. The view that Bracton's Romanism successfully converted our old "seisin" into the Roman "possession," for example, has recently been questioned.[2] As Professor Holdsworth has observed:

"We cannot say that all Bracton's law is English in substance, that the influence of Roman law is merely formal. No doubt there is a body of thoroughly English rules; and Bracton differs at very many points from the Roman texts. But it is clear that he has used Roman terms, Roman maxims, and Roman doctrines to construct upon native foundations a reasonable system out of comparatively meager authorities. Even when he is dealing with purely English portions of his treatise, and discoursing upon the Assizes, the writs of entry, or the writ of right, Roman illustrations and phrases naturally recur to him. And it is clear that his study of Roman law has led him to discuss problems which, when he wrote, were very far from any actual case argued in the royal courts. Thus he deals with *accessio, specificatio,* and *confusio;* and 'where,' says Maitland, 'in all our countless volumes of reports shall we find any decisions about some questions that Azo has suggested to Bracton?' Similarly he deals with many questions relating to obligation and contract, fraud and negligence, about which the common law had as yet no rules. In dealing with these matters he necessarily uses Roman terms and borrows Roman rules. It is, as we shall see, because his treatise has given to English law at least one authority upon many matters which were outside the routine of the practising lawyer of the thirteenth century that his influence upon the history of English law has been so great. That his treatise deals with such matters is due to the Roman law which it contains."

Bracton's influence has varied greatly from century to century. In his own day it must have been high, for numerous copies of his book were written and many more must have perished. But after a century his work became less popular. At first it suffered the usual fate of every successful book in the middle ages, that is to say, various writers prepared epitomes of it or revised it, but after 1350 or thereabout his popularity waned. The broad view and wide learning of Bracton gave way before the less genial science of procedure. For a time the common law devoted itself to the development of a rigid and rather needlessly complicated system, which demanded a close study of formidable masses of

1 Summarized in 2 Holdsworth, 271–282.

2 See the review of Joüon des Longrais, *La Saisine,* in 40 Harvard Law Review, 921–925.

detail. It was only centuries later that the printing press was to establish Bracton's position in English legal literature. The first edition, 1579, is a stately volume, perhaps the best printed law book we have ever had, and it came at a time when mediæval learning was needed. The steady growth of the powers of the Crown and the tendency towards State absolutism acting through the person of the monarch was inevitable after the Reformation. It is curious to mark the contrast between two books which appeared very close together, Bracton in 1569, and Smith, *De Republica Anglorum,* in 1583. In the latter, Elizabeth's Secretary of State, Sir Thomas Smith, set forth the truly fearful powers of the Crown in Parliament which can make and unmake law, change rights and possessions of private men, legitimate bastards, establish religions, condemn or absolve (by its attainders, etc.) whomsoever the Prince will. Smith was no friend of tyranny, but he clearly enjoyed enumerating in an imposing list the powers of the Tudor State. In Bracton, on the other hand, the emphasis was not upon power but upon responsibility; the King was subject to God, to the law, and (according to a doubtful but much-quoted passage) to his feudal court. Here was an antidote to that State absolutism which the later Tudors and the Stuarts attempted. Coke eagerly seized upon Bracton as a powerful weapon, and a second edition was published in the heat of the conflict of 1640.[1]

Bracton's influence was to extend to private law in the course of the eighteenth century. The passage we have already quoted from Professor Holdsworth indicates the reason. The time had come when the speculative questions which Bracton had raised turned up in actual practice. In looking for authority, attention turned to Bracton and there were found Bracton's own suggestions. But these suggestions were mostly drawn from the Roman legal literature, which was the only place in his day where such "academic" matters were to be found; and so the guidance which was found in Bracton's treatise was really Roman law. Thus, in the famous case of *Coggs* v. *Bernard.*[2] Lord Holt made great

[1] The third edition by Twiss in six volumes is most unreliable; the fourth, by Professor Woodbine, is in progress and when completed will be the only one based upon a full collation of most of the manuscripts. Two volumes have already appeared.

[2] 2 Ld. Raym. 909; Pound and Plucknett, *Readings,* 593–601.

use of Roman passages in Bracton (whom he praised highly) and thereby brought our law of bailments into line with that of the Roman law. Similarly, in the seventeenth and eighteenth centuries, passages of Bracton were much used in settling the law of easements,[1] which so far had been obscured by procedural considerations.

This curious history of Bracton's tardy influence on the law moved Maitland to the notable reflection that the rise of parliamentary supremacy had its disadvantages as well as its benefits. The decline of Bracton's influence in the middle of the fourteenth century coincides with Parliament's first assertions of its powers: already it had developed to be the principal, if not the only, legislative body, and the dominant interest in it was that of the common lawyers. The common lawyers were rapidly becoming a narrow profession, moreover. The Crown adopted the fateful practice of appointing judges from among the leading practitioners at the bar. Bench, bar and Parliament, therefore, were alike under the influence of the conservative, professionalized lawyer, to whom the complexities and technicalities of the law were a peculiar and valuable learning. Worst of all, these very men also acquired control of legal education as well. The inevitable result was the disappearance of a liberal outlook upon law, and the loss of contact with other systems. The speculative parts of Bracton's treatise must have seemed useless and academic; instead of this broad learning they turned to the narrow and tangled studies of procedure and pleading. It was the common lawyers who were mainly instrumental in making parliamentary supremacy a fact, but, as Maitland has said, "the supremacy of Parliament may have been worth the price paid for it; none the less, the price was high."[2] The price consisted in the extreme centralization of justice, the decline of old local institutions, the subjection of custom to the common law, the growth of immense quantities of technicality, opposition to reform, and the rejection of the broader and more liberal attitude towards law which showed so clearly in Bracton. It was very appropriate that when some of the mediæval deficiencies of the common law were at

1 See 7 Holdsworth, 323ff.
2 Maitland, 1 *Bracton's Note Book*, 7.

length supplied, Bracton should have played a noteworthy part, four or five centuries after his death.

Some curious things happened to Bracton's book. Occasionally a small extract from it began to circulate as a separate treatise; at least one portion found its way into the collection of statutes and seems to have been regarded as of official authority. Several smaller treatises were based upon it, but the longest and most important of them were *Fleta* and *Britton*. *Fleta* was written in Latin, and although based largely upon Bracton, contains some new matter; we have already mentioned his original and illuminating treatment of the courts of law, and the significant formula which he uses in describing them.[1] This is the portion of *Fleta's* work which is of most general importance. The rest is mainly an attempt to modernize Bracton in view of the legislation of Edward I. *Britton* is a rather different book. It is written in French and is of almost exactly the same date as *Fleta* (1290–1292). The remarkable thing about *Britton* is that it is in the form of a code and purports to be issued by royal authority. It is not impossible that the idea of codifying English law had been entertained by Edward I. That monarch had done something of the sort in the Statute of Wales to which we have already referred, and his English legislation was radical and comprehensive; certainly if a code was contemplated the great book of Bracton was an obvious model to which to turn. As Professor Winfield has observed, it is time that *Britton's* pretensions were investigated; in the middle ages it seems that his official authority was recognized, and it is hardly likely that such a claim would have been made if there had been no foundation for it whatever.[2] In any case *Britton* enjoyed a great popularity for many centuries, and was soon put into print. *Fleta,* on the other hand, was hardly a success, probably because common lawyers, as time went on, read Latin with less ease, and so naturally turned to the familiar French of *Britton.*

Just at this moment (the earlier portion of Edward I's reign) we come to the new style of literature which was eventually to supplant the Bractonian tradition. It consists of a large number of little treatises on writs, declarations, and other procedural matters, interspersed with a number of cases which are sometimes

[1] Above, p. 133.

[2] Winfield, *Chief Sources of English Legal History,* 264.

narrated, and sometimes represented by extracts from the pleadings. The proportions in which these various elements occur vary considerably; it has been well observed:

"It was a period in which men were groping for forms of expressing the law. They did not quite know what ought to go into a law book, or how the matter should be distributed, or whether portions of it had better be left for incorporation in some other book, or what the title of the book should be. On all these points the period was one of experiment. In a later era cases will go to one book, writs to another, pleadings to yet another; abridgments of cases will be separated from reports of them, and land law and pleas of the Crown will be dignified with separate monographs. . . . And so in the dawn of our legal literature we can see men treading in the uncertain light, first in one direction, and then in another. Some thought that the right path was report *plus* pleading *plus* note *plus* institutional instruction, some that a combination of any three or two of these would suffice." [1]

Indeed, this very hesitation as to the form which legal literature should take shows how completely practitioners were turning their backs upon the Bractonian tradition. It may perhaps be conjectured that these little treatises we are discussing are intimately connected with the beginnings of legal education. It was a momentous decision when that important function was left entirely in the hands of the practitioners themselves, and carried out, it would seem, by allowing students to attend the courts and to rely for an explanation of what they heard there upon conversation which crossed the dinner table in the lawyers' inns, assisted perhaps by some of these little treatises.

It has been suggested by Professor Winfield with a good deal of reason that the *Year Books* may have begun in this way. It would seem that a treatise upon procedure, then as now, needed constant revision if it was to retain its usefulness. It is only natural that the owner of one of these little compendiums should annotate it in the light of recent cases.[2] This he might do either from watching proceedings in court, or from consultation with lawyers who would give him access to the notes[3] of their plead-

[1] Winfield, *Chief Sources of English Legal History*, 161–2, 170.

[2] "Possibly the embryo of the *Year Books* lies in some treatise which is not primarily a report at all."—Winfield, *op. cit.*, 169.

[3] Some such hypothesis must be admitted, for it is clear that (*a*) formal written pleadings were not yet in use; (*b*) that the plea rolls were not yet accessible to the profession, even in such extreme cases as when private rights could be established from them. Lambert, *Les Year Books*, 20 n. 1.

ings. In this way some of the illustrations would be French reports, while others might be Latin forms. In the end it must have occurred to several minds at once that such reports need not necessarily be interspersed through one of these treatises, and that a small separate collection could be made consisting only of cases. As a result the treatises will assume a more definite form, while the fluctuating case material will become a separate class of literature. It certainly is a fact that after the early years of the fourteenth century these treatises can be identified with fair certainty, although in their earliest form no two manuscripts agree, and it is extremely difficult to say with confidence whether one has two manuscripts of the same treatise or two different treatises.[1]

Our earliest *Year Books,* therefore, seem to be subsidiary to these little manuals of procedure, and this theory is confirmed by the fact that the matters which they recount are mainly concerned with the details of process and pleading. But one of the most puzzling features of the history of the *Year Books* is the constant change in their character and outlook; the combination of causes which produced them in the first place was very different from the circumstances which made for their continuance; indeed several periods can be discerned during which the *Year Books* seem to have fulfilled distinctly different functions. Having originated early in the reign of Edward I, by the time we come to his son and successor Edward II, the *Year Books* have already taken another aspect. In the first place the number of manuscripts still surviving of the years of Edward II is very great—much greater than for Edward I—and the relationship between them very complex. They seem to fall into numerous small groups, and yet even these groupings at the end of a year or even of a term are dissolved and new associations formed. The differences between them are enormous, and there must have been a large number of persons independently reporting cases. At the same time their character changes somewhat; their outlook becomes broader and the reports are much more thorough. A large amount of the material which they contain is hardly strictly necessary for professional purposes. Long and rambling conversations are reported at great length. A large amount of irrelevant material is carefully recorded. There seems to be a definite

[1] Winfield, *op. cit.*, 271.

interest in the personalities of judges and serjeants. If the object of the *Year Books* still remained what it was in the reign of Edward I, it would surely have been unnecessary to report so many cases or to report them so fully. One cannot avoid the feeling that the anonymous authors of these *Year Books* took a great delight in the work of compiling them whatever the technical object was which they had in view. In an endeavor to explain the peculiarities of the manuscripts Mr. G. J. Turner has developed what he has called the "pamphlet theory." According to this hypothesis the Year Books first circulated in the form of small pamphlets containing comparatively few cases. As these pamphlets passed from hand to hand, the material they contained was recopied into volumes such as those which now survive. These secondary compilations usually contain several terms together, and are clearly based upon a number of different temporary texts assembled by chance in the hands of their compilers. Mr. Turner's theory therefore goes a long way towards explaining both the divergencies of the existing texts, and the absence at the present day of anything which can be justly regarded as an original *Year Book*.[1]

In the reign of Edward II—

"there were frequently found to be two, three, four, or even more versions of one case, so different that collation was impossible, and each of these versions might be represented (with minor variants) by several manuscripts. It is this abundance and diversity of material which has put such a heavy load upon the heroic editors of Edward II's *Year Books*. Behind it all we seem to catch glimpses of a big and busy profession in a state of almost feverish activity; reports were taken independently by many hands, then borrowed, copied, collated, and annotated; in an age when great judges were discussing momentous matters, their words were awaited with eagerness by the quick-witted serjeants who practised before them. It is impossible to miss the note of admiration for the heroes of the bench and bar which runs through the reports, and the almost excited interest which follows the success or failure of some clever attempt by counsel to maintain a difficult position when called upon to do so. To contemporary readers who were perfectly familiar with the rules of the game these early *Year Books* must have read something like vivid newspaper reports of a highly intellectual sport, where even irrelevancies—the quip, the jest, the neat quotation—all have a natural part. Legal science no doubt was their ultimate aim, but they

[1] It may be supposed that the originals were not preserved when they were superseded by larger volumes—cf., the modern "advance sheets" of reports.

are so full of the joy of forensic battle that one is inclined to look upon them as allied to literature rather than to the cold, impersonal law report of the present day. Throughout the *Year Books* of Edward II there breathes a spirit of keenness, of combativeness and restlessness which makes them the gayest of law books."[1]

In fact we venture to suggest that the *Year Books* of Edward II resemble not so much the modern law report as a professional newspaper which combines matters of technical interest with the lighter side of professional life. They represent not merely the legal learning of the time of Edward II, but also its high spirits and its professional feeling—even bits of gossip and anecdotes.

In consequence of this broadening of the field covered by the *Year Books*, they are apt to contain a much greater variety of matter. Although the proper conduct of mesne process is still an essential part of a lawyer's business, the *Year Books* no longer confine themselves to technicalities of this sort. Similarly, the proper forms of declarations and pleadings, and ingenious methods of putting some facts into issue, or of keeping others in the background, do not exhaust the possibilities of pleading. Matters of substantive law are raised and argued and reported as occasion requires. In the *Year Books* of Edward II a very prominent place is occupied by the recent legislation of Edward I; hardly any branch of law in daily use had been left unchanged by the great statutes with which the thirteenth century concludes, and the *Year Books* of Edward II are deeply concerned with the questions which those statutes raised. They are constantly discussing the relationship between the "old" law and the "new," and it may very well be that the remarkably increased production of *Year Books* in Edward II's reign was stimulated by this critical situation. A good deal of the common law had to be revised in view of this remarkable outburst of legislation.

Of the reign of Edward III less can be said at present, for comparatively few of his *Year Books* have been edited with the same thoroughness as those of Edward II. During the first half of his reign the situation still seems comparable to that under Edward II. It would appear that manuscripts are still numerous and their divergencies considerable. Although in many cases the reports are as full and journalistic, so to speak, as under his father, there is, we believe, a tendency to make them less verbose

[1] Plucknett, *Year Book 13 Richard* II, xiii, xiv.

and more businesslike. More than this can hardly be said in the present state of our knowledge.

With the reign of Richard II we enter upon a new era in the history of the *Year Books*. The following remarks are based upon a study of the manuscripts of his thirteenth year:

"With this atmosphere [of Edward II's reign] the years of Richard II are in the strongest contrast. The high spirits of the youthful common law are now replaced by a slightly solemn application to business; clearly, we are settling down. Or, to change the metaphor, the somewhat rough and tumble sport of the early years of the century has become a 'national institution' at its close, and with the usual result. The reflection of this change can be seen clearly in the textual apparatus to the pages that follow, for we find that our manuscripts are united by a surprising unanimity on all but the slightest details. All our texts are well within the limits of collatability. They are all clear, well reported, succinct and practical. There are no irrelevancies to distract attention from the main interest—for there is abundant interest here, although of a different kind. In the *Year Books* of Edward II, it is very common to find 'uncollatable reports' and their origin is simple enough to discover. In prolonged argument, it is inevitable that the same proposition should be repeated several times in slightly differing forms; and all the more so when the discussion has been adjourned to 'another day,' as the books put it. Consequently, if several people are independently reporting the debate, it is very likely that they will not all select the same from among the alternative forms of that particular argument. Their reports, though in substance consistent, will very likely be uncollatable. Now in the reign of Richard II we still find, both in the reports and in the rolls, instances of debates being adjourned from one day to another, where the point is difficult, as well as some debates which are reported at considerable length. And yet all our manuscripts are easily collatable. In the exchange of oral argument, all our manuscripts give us the same portions of the discussion, even the same repetitions; never do we find in the 13th year any ground for thinking that there was another version before us, or accessible to the surviving manuscript writers. The conclusion is irresistible: there was but one report—perhaps only one reporter." [1]

Further than this we cannot go, for the *Year Books* of the fifteenth century have not yet been re-edited, and so the condition of the manuscripts is not known with certainty. Our own impression is that the manuscripts are few and closely related, and that they are represented with tolerable accuracy by the old printed versions. As for their contents, the cases reported are

1 Plucknett, *Year Book 13 Richard II*. xiv, xv.

apt to be fewer and better chosen (judged from the standpoint, of course, of the modern report). The fifteenth-century *Year Books* are less vivacious than those of Edward II, but on the other hand the material they contain is of more uniform quality, in many cases consisting of full-dress debates by many judges of really important legal questions. Yet even here it sometimes happens that the reader will receive a shock in finding out that what he at first thought was a formal argument in court turns out to be, on fuller examination, a supper-table discussion among the judges and serjeants. Indeed, for a long time it seems to have been the custom to continue court discussions after court hours in Serjeants' Inn, for it is a significant feature of the English system that the judges and serjeants lodged together during term time. There thus existed the closest intimacy between bench and bar.

One thing at least is clear. The *Year Books* did not exist for the same reason as the modern law report. They were not intended to collect precedents whose authority should be binding in later cases. This is clear from examining the manuscripts; from the style of the handwriting it is obvious that the manuscripts were written within a few years of the cases they contained. Older cases which might have been authoritative according to modern ideas were no longer interesting. It is common to find a fifteenth-century manuscript which contains a long range of statutes covering two centuries or more; but a *Year Book* manuscript rarely covers more than a few years, and those years are not very far removed from the date of the handwriting. Even with the invention of printing it was comparatively recent cases which were first put into print, although it is significant that by 1520 a few, at least, of the *Year Books* of Edward III had been printed; by the time we reach the reign of Queen Mary, however (1553–1558), it was possible to make up a tolerably complete series of *Year Books* from the middle of Edward III's reign onwards. This is surely a token of a change of attitude toward the *Year Books*. While the *Year Books* are in the journalistic stage it is only the recent numbers which are of interest; but when the principle of case law begins to be understood, then even old cases may turn out to be of practical importance, and consequently a longer range of reports is desirable.

Much still remains to be done in the study of the *Year Books*,

for in our opinion generalizations based upon one reign cannot with confidence be used of other periods. Extending as they do from 1283 (these earliest *Year Books*, however, still remain in manuscript unpublished) down to 1535, it is only natural that they should reflect the changes in thought and legal outlook which took place in the course of two and a half centuries, and it is essential, if good work is to be done, to resist the temptation of treating all the *Year Books* as if they were simultaneously produced by the same causes and for the same purpose.

After this long digression in tracing the series of the *Year Books* from mediæval to modern times, we must now return to the thirteenth and fourteenth centuries. Very intimately connected with the *Year Books* are the *Abridgments*. Just as the character of the *Year Books* fluctuated, so their relationship to the *Abridgments* was by no means always the same. The very earliest *Year Books* known to us in one or two cases do in fact take the form of what we should now call an abridgment. This form consists in the arrangement of the cases according to subject matter, and it may be that our earliest *Year Books* appeared in this form before they assumed the more familiar shape of a chronological arrangement independent of subject. Having once abandoned a subject arrangement, it seems soon to have been felt that owing to the growing bulk of the *Year Books* (and perhaps also owing to the growing importance placed upon them) there should be some easy means of access provided. It became a universal custom to place a word or two in the margin indicating the form of action or other principal matter, and this seems to have led to the practice of arranging abstracts of *Year Book* cases in a subject classification. Occasionally we find that the so-called *Abridgment* gives in fact the full text of the case, but more generally we find condensed reports. These *Abridgments* have the same characteristic as the *Year Book* manuscripts themselves—the period of years they cover is comparatively short. It seems rather likely that the preparation of *Abridgments* was always closely connected with teaching methods. This is undoubtedly true in the sixteenth and seventeenth centuries when it seems to have been the regular practice for law students to buy an enormous folio volume completely blank: having headed the pages in an engrossing hand with the titles under which the mat-

ter was to be distributed, the student then proceeded to read selected *Year Books* or the early reporters and place abstracts of the cases under the appropriate headings. This was no doubt an effective discipline but it was certainly laborious; many of these seventeenth-century commonplace books have come down to us in almost their original condition, that is to say, almost completely blank. It may be possible that the fourteenth and fifteenth century *Abridgments* were also originally of the nature of students' exercises. In time, no doubt, *Abridgments* were found to have other uses, and this seems to be indicated by the fact that lawyers were apt to collect old *Abridgments*, take them to pieces and reassemble them in one large alphabet. Examples of this are to be found towards the close of the fifteenth century, and it is tolerably certain that the *Abridgments* printed in the sixteenth century had a similar origin. No other hypothesis would explain the curious arrangement of the cases within each title of the works of Statham and Fitzherbert.

The first *Abridgment* to get into print is traditionally known as Statham, although there is no indication in the book or elsewhere of its authorship. It was printed in France for the English publisher Pynson about 1490 or 1495, and besides being a rare and costly book is also a beautiful piece of printing. As with all the earlier *Abridgments* the arrangement of the cases within the titles is curious, and seems only explicable by supposing that it was based on a composite volume which had been made up from the fragments of earlier *Abridgments*. Very soon, however, Statham was practically superseded by a very much larger work, the later editions of which claim to be "the grand *Abridgment* collected by the Right Reverend Judge Sir Antony Fitzherbert." The earliest edition (1516)[1] does not bear Fitzherbert's name or any other indication of alleged authorship. Fitzherbert's name first appears in the edition of 1565. Fitzherbert himself died in 1538. In Fitzherbert, as in Statham, the cases are grouped in a peculiar manner and the conclusion is irresistible that his book, too, was a product of the scissors-and-paste method. However, while Statham is a fairly small book, Fitzherbert's is in three large folio volumes (subsequently compressed by means of small print to one short, thick folio). Fitzherbert's book im-

[1] As to this date see Winfield, *Chief Sources*, 225.

mediately became extremely popular. It has even been suggested that for practical purposes people rarely went behind him to the *Year Books*. It seems to be a fact that most of the *Year Book* cases of any consequence are to be found in Fitzherbert's *Abridgment*, being represented there by fairly long extracts and sometimes by a full text. The convenience of having a large mass of case material within the covers of one book is obvious, and it seems that for a long time Fitzherbert served the purpose of a large selection of the most important cases in the *Year Books*. It is clear that he had access to some very choice material. The very earliest known *Year Books* are represented in his collection. Occasionally he gives us a better text than is to be found elsewhere. Most remarkable of all, Fitzherbert knew and used that memorable collection of cases which Bracton made for his own private use; it was only the discovery and the publication of Bracton's *Note Book* in 1887 which revealed the source whence Fitzherbert derived his cases from the reign of Henry III. So, too, Fitzherbert has numerous cases from the reign of Richard II which still remain unprinted anywhere else. Citation of Fitzherbert's *Abridgment* was facilitated by a new device. The cases were numbered consecutively throughout each title, the titles themselves being in a rough alphabetical arrangement. So famous was the book that it was cited without its author's name; hence a reference to *Briefe 949* is understood to mean the case bearing that number in the title *Briefe* of Fitzherbert's *Abridgment*. Any other *Abridgment* would have to be cited by name. From the constant use and hard study which were bestowed upon Fitzherbert's *Abridgment*, it is clear that in the sixteenth century lawyers had a practical interest in a volume of cases ranging over three hundred years; the later editions of Fitzherbert contain mechanical improvements enabling it to be used as a quick means of access to the *Year Books* themselves. This was effected by giving a reference to the page in the *Year Book* in the margin of the *Abridgment*. At the same time later editions of the *Year Books* contain cross references to the *Abridgment*. When we see this sort of thing, we may be sure that the modern attitude toward case law has appeared. Numerous other *Abridgments* followed in a continuous stream down to the encyclopædias and digests of our own day.

It now remains to mention in brief the history of the *Register of Writs*.[1] We have already referred to the importance which the writ attained in the English legal system, and it is only natural that collections should be made of those forms most generally in use. No light whatever has been thrown upon the authorship of the *Register*. As it was the privilege of Chancery to issue original writs, one would naturally expect to find official collections of forms prepared by the office for its own use. This, however, seems hardly the case. The great bulk of the manuscripts come from private hands—either monasteries or practitioners being the usual owners. Of the numerous manuscripts which have survived hardly any two exactly correspond, for the *Register of Writs* is an extremely variable and shifting collection. On the other hand, there was a certain amount of official sanction for it, for the government sent a copy of one to the authorities in Ireland in 1227, while an apparently official copy for use in Chester is also still surviving. Most of what we know concerning the history of the *Register* has been set forth by Maitland in his famous articles in the Harvard Law Review,[2] and it must be confessed that he raised a good many more problems than he solved. It was characteristic of mediæval administration that the compilation of collections of forms (which nowadays would often be done officially) was then left to the enterprise of anyone who cared to undertake it, and consequently the results of such effort were at best only semi-official.

The whole of the fourteenth century is therefore occupied with the development of the *Year Books*, the *Register*, and the procedural tracts. There is no trace of any attempt to write an extended work comparable to the treatise of Bracton. So, too, in the fifteenth century until we reach the remarkable book of Littleton. Littleton filled several local offices in Worcestershire and became reader in the Inner Temple; in 1453 he became serjeant, and in 1455 he rode the northern circuit as Judge of Assize. Just as it is impossible to detect Bracton's sympathies in the Barons' War, so we have no indication of Littleton taking sides during the Wars of the Roses. In 1466 he became a judge of the Court of

[1] *Registrum Omnium Brevium.* There are four editions between 1531 and 1687.

[2] 3 Harvard Law Review; reprinted in 2 *Select Essays in Anglo-American Legal History*, 549–596.

Common Pleas and in 1475 he was made a Knight of the Bath. He died in 1481 and was buried in Worcester Cathedral.[1] His treatise "*Of Tenures*" is the first great English law book since Bracton. By Littleton's day the law of real property had become quite complicated, and he displays a superb mastery in arranging and reducing a difficult mass of law to an orderly and logical system. His work consisted of a discussion in order of the various estates possible in his day; this occupies the first book. The second treats of the incidents of tenure, while the third deals with co-ownership and various special doctrines connected with real property. Throughout the work his expression is singularly lucid, and never is substantive law obscured by procedure. To some extent Littleton was anticipated by a little treatise of the reign of Edward III which is now generally called the "*Old Tenures.*" This little book, however, will not bear comparison with Littleton, although he was modest enough to pretend that his work was merely an expansion of the older treatise. Although Littleton does not very often mention cases, it is perfectly obvious that cases have played a large part in settling the law as he lays it down. The great characteristic of his work is its value as a text book; for three hundred years it was the usual introduction read by students of real property law. It very early found its way into print, and won the admiration of Coke who declared that it was the most perfect work in any human science. Coke composed a commentary upon it (forming the first part of his *Institutes*) which is extremely discursive, but full of valuable information.

Contemporary with Littleton was Sir John Fortescue. He studied law at Lincoln's Inn, became serjeant in 1430, and Chief Justice of the King's Bench in 1442. Unlike Littleton, however, he became involved in politics, joining the Lancastrian party and going into exile in France with the Queen. It was apparently during this time that he was given the title of Chancellor, for he seems never to have exercised the office in England. After the failure of the short restoration of Henry VI in 1471, Fortescue recognized that the Lancastrian cause was irretrievably lost, and so he submitted to Edward IV, was pardoned, and made a member of the Council. We hear nothing of him after the year 1476.

[1] The fullest life of Littleton is in Wambaugh's introduction to his edition of the *Tenures*.

His was truly a remarkable mind. Both he and Littleton lived in an age when the common law developed a strong liking for technicality for its own sake. Littleton mastered this by sheer power of analysis, while Fortescue arrived at a similar mastery through a different experience. The wretched years of exile which he passed in danger and poverty had enabled him to study the working of foreign systems. His treatise *"In Praise of the Laws of England"* was written for the instruction of the young Prince Edward, in order to teach him the character of the limited monarchy which he was fated never to exercise. Cast in the form of a dialogue between Fortescue and the Prince, the book is mainly concerned with a comparative study of English and French government. It is therefore an early example of the comparative method in politics. In describing England he gives us our earliest account of the Inns of Court and of the legal profession, while he explains in simple words some of the fundamental ideas of the common law. As Professor Holdsworth observes, "It is probably the first legal book which was avowedly written to instruct a layman in the elements of law. The consequent lucidity of its style together with the unique character of the information it contains explains why it has always been among lawyers the most popular of Fortescue's works."[1] He wrote one work in English under the title *The Governance of England.* In this treatise he endeavors to discover the real causes of the collapse of Lancastrian government, and here we see how deeply Fortescue had thought upon the evils of his time. Fortescue through his works shows a passionate devotion to the idea of limited monarchy; time after time he denounces tyranny and such oppressive devices as the judicial use of torture which were currently used in contemporary France. Like many people who have to live abroad, he found it difficult to resist the tendency to idealize his own country; even the French language as it was spoken in France seemed to him rude and corrupt when compared with the French of the *Year Books.*

The effect of the new learning upon English law is clearly seen in the work of Christopher St. Germain (1460–1540). He was a barrister of the Inner Temple who had a remarkable knowledge of legal philosophy and canon law which he used as the basis of

[1] 2 Holdsworth, 570.

his criticism of the common law in two *Dialogues between a Doctor of Divinity and a Student of the Common Law*. The first was apparently published in 1523 and the second in 1530, the whole being revised in 1532. This work is very important for the history of English legal thought and particularly for the ideas which underlie equity. According to St. Germain, the philosophical justification for equity was to be found in the canon law which had long accepted the principle that the circumstances of human life are so infinitely various that it is impossible to make a general rule which will cover them all. Equity in some form or other is therefore a necessity if injustice is to be prevented. No amount of ingenuity can devise a system which will do justice by rule, for life is bigger than any generalization that can be made about it. And so discretion based upon conscience is bound to enter into any legal system which is at all adequate. The principle of equity St. Germain declared to be conscience, and this was a typical conception of canon law. As Professor Holdsworth has observed, these *Dialogues* appeared at a critical moment. As the result of the impending Reformation the long line of ecclesiastical chancellors was soon to end, and if the fundamental notions upon which they had acted were not to be forgotten, then some such book as this was a prime necessity. It had all the success which St. Germain could have wished. The new school of lay chancellors learned from it the ancient doctrine of conscience, and so were able to continue the work of their predecessors in the same spirit. The *Dialogues* were followed by a small controversial literature which bears witness to the deep effect St. Germain's book produced upon the public mind.

The appearance of *Doctor and Student* coincides with the end of the *Year Books*, which ceased to appear after 1535. Their place was taken by something which was at first not so very different, namely, the early reporters. These almost always appear under the name of some distinguished lawyer or judge, with the implication that he was in some way concerned with their production. As a matter of fact many of the named reports have little visible connection with the distinguished lawyer whose authority is invoked on their behalf. While some of them were deliberately made in an attempt to provide a complete report of striking cases, others seem to be extremely informal notes which were no doubt intelligible to the author of them, but give very

little light to a modern reader. A number of such reports were published after their authors' death, sometimes, it would seem, under unethical circumstances. There is, therefore, every possible variety of report, good, bad and indifferent, and in using them it is well to have at hand some such books as Wallace, *The Reporters* (fourth edition, 1882), where the characteristics and reputation of each volume are carefully discussed.[1]

The first of these named reports, that of Dyer, runs from 1537 to 1582 and immediately achieved a high reputation. Plowden duplicated most of this period (1550–1580) in a volume of very fine reports, and immediately became highly authoritative. It is significant that Plowden's book, although actually consisting of reports, is entitled "Commentaries." Coke, the most famous of all the reporters, covers the years 1572 to 1616, and was so highly considered by the profession that his work is cited simply as *"The Reports."* Their method is far from ideal, but their influence has been tremendous. Coke seems to have set himself no less a task than that of stating in systematic and historical form the principles of English law as they arose in litigation before him. Each case, therefore, contains a thorough summary of all authority upon it down to his own day. However bewildering this must have been to the practising lawyer, to the historian it constitutes one of the main merits of Coke's *Reports;* by far the easiest way of finding mediæval authority on a point is to begin with a case in Coke's *Reports*—and in fact it is almost always possible to find a case in point among his thirteen volumes. Even in Coke's day, however, the modern attitude towards case law had hardly been completely accepted. In his hands a law report takes the form of a somewhat rambling disquisition upon the case in question. He frequently gives the pleadings, but less often does he tell us the arguments. As for the decision, it is often impossible to distinguish the remarks of the judge (where it was not Coke himself) from the comments of the reporter. There was no clear boundary in his mind between what a case said and what he thought it ought to say, between the reasons which actually prompted the decision, and the elaborate commentary which he could easily weave around any question. A case in Coke's *Re-*

[1] Wallace ends at 1776. His work has been continued by Sir J. C. Fox, *Handbook of English Law Reports*, of which Part I (House of Lords, Privy Council and Chancery), appeared in 1913.

ports, therefore, is an uncertain mingling of genuine report, commentary, criticism, elementary instruction, and recondite legal history. The whole is dominated by Coke's personality, and derives its authority from him. All the miscellaneous elements which appear in his *Reports* are apt to acquire a fairly uniform authority; even if a particular passage is in fact Coke's comment, and not part of the case he purports to have reported, it is none the worse for that; anything that Coke wrote, be it case or comment, is entitled to the highest respect.

The reporters who succeed Coke are much lesser men. Although they do not intrude their own opinions into their books to the extent that he did, they are for other reasons still very unsatisfactory. Their reports are frequently short and inaccurate, and sometimes unintelligible. Matters are not helped by the fact that one case is commonly reported by three or four reporters, for they are often equally bad. The inadequacy of the reporters after Coke and before the middle of the eighteenth century makes the legal history of that period a difficult study.

Burrow's *Reports* (1756–1772) introduced a new standard. At last we find a clear discrimination between facts, arguments and decision, and from his day onwards the necessary qualities of a good law report were understood, although sometimes they were not always reached. By the close of the eighteenth century judges adopted the practice of looking over the draft reports of their decisions, and in this way certain reporters were regarded as "authorized." This was the first step towards the establishment of the official series of Law Reports in 1865.

Besides the works we have mentioned, there were during the sixteenth and seventeenth centuries a good many treatises of less importance, such as those dealing with the jurisdiction of courts, the authority of justices of the peace, local courts and jurisdictions, and such like. As we approach the middle of the seventeenth century, we once again find an attempt to deal with English law comprehensively, such as had not been made since the days of Bracton. The form which it now took in Sir Edward Coke's hands, however, was peculiar and deeply significant of the historical development of English law. Of his *Reports* we have already spoken. They were in fact only one of the methods whereby he hoped to re-state English law. His other attempts were all of them based upon one or another of the various forms through

which the common law had developed. In the *Reports* he embodied the bulk of English law in the form of decisions, or comments upon decisions. In his *First Institute* (1628) he covered much the same ground by the slightly different method of a comment upon Littleton's *Tenures*. In his *Second Institute* he did it all again by means of a commentary upon the principal statutes. The *Third Institute* is a treatise on criminal law, taking the pleas of the Crown in order, while the *Fourth Institute* is a description of the jurisdiction and history of the courts. Coke seems to have established his reputation by sheer weight of learning. Any criticism was immediately met by an overpowering broadside of citations to the *Year Books*. His attitude toward English law was largely mediæval; he saw in the law the great controlling factor in social life by which Crown and Parliament were equally governed. But outside of the common law he never ventured. The cosmopolitan learning of his predecessors, such as Bracton or Fortescue, meant nothing to him, neither did the wide culture of Bacon or Selden. The whole of his intellectual equipment was to be found in the *Year Books*. We have already mentioned that the reprinting of the early *Year Books* indicates some sort of interest in the older English law. Coke in particular was prepared to cite authorities on any proposition from any century in English legal history. This does not mean, of course, that Coke was a professed historian; on the contrary, all his ancient learning professed to be of immediate practical value. Then again, although he was so devoted to the remoter past of English law, he was nevertheless of a progressive turn of mind, and there is really little trace of any marked conservatism in his judgments. The great value of his *Reports*, in fact, lies in this, that although they summarize mediæval authority upon a point, yet in many cases they also lay the foundations of a modern doctrine. In short Coke was essentially progressive in spite of his antiquarian bent. He is therefore a curious combination of an apparent conservatism based upon a superstitious reverence for black-letter, and a truly progressive and constructive outlook upon current legal questions. Indeed, his principal limitations came less from his antiquarian learning than from his professional feeling as a common lawyer. This is particularly the case with his attacks upon the Court of Chancery; from reading Coke's writings one would hardly suspect that there was already a flourishing system of equity. It must be

confessed that there are very few literary graces to be found in his writings. His statements are usually terse but overburdened with allusions and citations, while the arrangement of his matter is often careless. He also had a very curious habit of using passably good Latin maxims which usually had an air of antiquity about them, in spite of the fact that he himself invented them. This is a small detail, but it shows how easily Coke's mind would run upon mediæval lines. Indeed, Coke's great mission was to reconcile the mediæval and the modern. The rapid growth of the law in the sixteenth century had taken place in an environment of unfamiliar ideas. The Reformation and the Renaissance seemed to constitute a serious break with the past. Coke's great contemporary, Bacon, expressed a fear that English law was being uprooted and losing its contact with the experience of former ages. Bacon likewise admitted that it was Coke who checked this tendency, and restored a continuity in spirit and method between his own age and the period before the Reformation. The value of such a work can hardly be overestimated. For a moment it had been uncertain how far the common law would survive either in substance or in its traditional technique. Many proposals were in the air, some for a codification of the common law, others for a resort to a somewhat formless equity. If either of these had succeeded, English law would have developed a different set of tools, new methods of handling them, and, in consequence, a very different spirit. It was the influence of Coke, assisted by the political conditions of the Stuart conflict, which prevented all this. The momentous alliance of Parliament with the common lawyers made a clear issue between tradition, common law, and the mediæval view on one hand, and, on the other, the newer ideas of statecraft, absolutism, and a supreme royal equity. In fighting out this issue, the work of Coke was of very great value to the parliamentarian side. He was one of the few men who had thoroughly mastered the forbidding mass of the *Year Books*, and so deep was his erudition that most people were inclined to take his word for almost any proposition. There was almost immediately a tendency not to go behind Coke. The old authorities which he cited would continue to be cited; those which he omitted would never be dug up. Consequently the seventeenth century was apt to see the mediæval authorities only through Coke's eyes. This was a distinct practical advantage. If every lawyer had gone to

the *Year Books* for himself and read them as uncritically as Coke did, it might well have turned out that his idea of the continuity of English law would have broken down. As it happened, lawyers voluntarily resigned to him their private judgment of the *Year Books*, and so by a careful selection of material Coke was enabled to conceal the inconsistencies and difficulties which were inherent in his position. In fact, there is truth in the paradox that it was Coke, the greatest exponent of *Year Book* learning, who killed the study of *Year Books* in England; his knowledge of them was so complete, and he used it with such great discretion, that contemporaries immediately recognized that to go behind Coke's apparatus was simply to seek for confusion and doubt. In fact, from Coke's day onward lawyers rarely ventured to look at the *Year Books* unless they had first assured themselves of Coke's guidance, and made up their minds to reach Coke's conclusions.

There is, of course, another side to the picture. The triumph of Coke's view in many cases meant the triumph of doctrines which were already nearly obsolete in his own day. At the same time the opposition of Coke and his party to the jurisdictions of equity and admiralty retarded very considerably development in these directions. Their insistence that all courts should be common law courts, when as a matter of fact there was no adequate common law on several important topics, eliminated the foreign influences which were normally active in courts with a commercial jurisdiction. It is therefore not unfair to say that Coke's influence made for the establishment of a supreme common law, and for the abolition or severe restriction of all other forms of law in the country. His triumph therefore introduced a certain narrowness and conservatism which stood in the way of reform. Indeed, it was not until the early nineteenth century that we began to make reforms which had actually been demanded in Coke's own day by his great rival Bacon.

The other legal writing of Coke's day is either of a strictly practical character, or concerned with legal history. Of the latter type there are several notable examples in the seventeenth century. One of the greatest of English historical scholars was John Selden (1584–1654) who had a deep and broad learning of many legal systems, English, Roman and Jewish. His *Table Talk* (recently re-edited by Sir Frederick Pollock) contains his brief and weighty opinions on many important subjects, and has long been

a great classic among lawyers. William Prynne (1600-1669) was an historian of extraordinary learning with a great familiarity with public records of every class. It is his extensive quotations from rolls which are still unpublished which make his works valuable even to-day; to contemporaries, however, he was chiefly known as a very violent, but brilliant, controversialist. Sir Matthew Hale (1609–1676) was one of the most remarkable characters of the seventeenth century. After short experiences in the Church and the Army, he finally took to the law, and rapidly rose in the profession. He defended Archbishop Laud and others whom Parliament attacked, but was only a moderate royalist. On the execution of Charles I he accepted the Commonwealth, and in 1654 he became Judge of the Common Pleas. At the same time he worked for the Restoration; when it was accomplished he became Chief Baron, and in 1671 Chief Justice of the King's Bench. He died in 1676. He had a remarkable and winning personality and soon achieved enormous influence through his learning and his honesty. A valuable collection of his books and manuscripts (including several *Year Book* manuscripts) is now in the Library of Lincoln's Inn. He wrote a *History of the Common Law*, or rather a sketch of a proposed history, which has considerable merit besides being the first general history of English law. His history of the *Jurisdiction of the Lords' House* is still a very sound piece of work, and all the more remarkable in view of the fierce controversy on the subject then prevailing. His most important work, however, was his *History of the Pleas of the Crown*, which from that day to this has enjoyed a very high reputation. His works (which also included theological and scientific studies) were almost all published only after his death.

It is not until the middle of the next century that we come to a legal writer with a broad outlook. There had been a growing class, it is true, of text book writers upon various branches of the law, but they are all overshadowed by the mastery with which Sir William Blackstone (1723–1780) drew a general picture in his *Commentaries* of the whole of English law. He was an Oxford scholar of varied accomplishments. Among his unpublished works are a treatise on architecture and many verses. He was also a Shakespearean scholar of some ability. Dividing his time between the bar and the University meant that he was slow to establish a professional position. In 1758 he was made the first

Vinerian professor, the chair having been founded by Charles Viner with the copyright of his *Abridgment* as an endowment. Even before 1758 he had given regular lectures at Oxford, and these were eventually printed in 1765 under the title of *Commentaries on the Laws of England*, having first been very much pirated. He became a member of Parliament and in 1770 became Judge of the Common Pleas, an office which he almost immediately exchanged for a seat in the King's Bench, moving back to the Common Pleas six months later. His judicial career was distinguished. During the latter part of his life he became an advocate of prison reform and secured some legislation in that direction. It was not, however, until forty years later that prison reform became a matter of practical politics. His *Reports* were published the year after his death.

A word must be said concerning the *Commentaries*. "Twice in the history of English law has an Englishman had the motive, the courage, the power, to write a great, readable, reasonable book about English law as a whole." First it was Bracton, and five hundred years later Blackstone. Blackstone had always been of a literary turn, and his career resembles much more that of a law professor in this country than that of the usual legal practitioner of his own time. It was not common in his day for intending lawyers to seek high University honors, and it was still more unusual to reach the bench without spending many years in active practice. His great skill consisted in affording a reasonable explanation for the state of English law as it then existed. Some portions he explained on logical grounds, others from history. His history was not very profound, and even his equipment in jurisprudence was somewhat slender. But his freedom from excessive learning was an actual merit; he found explanations which seemed adequate, clear, and above all interesting, and the one object he kept constantly before him was to maintain a variety of interest throughout his book. The point of view here involved is of great importance. We have said that Blackstone was the first Vinerian professor, in fact the very first Professor of English Law, and this in itself is highly significant. The common law became a subject of University study by people who did not necessarily intend to become lawyers. Blackstone's lectures and *Commentaries* are an attempt to explain and justify the common law in the eyes of the laity. He finally recognized that the law is not

merely the concern of a small and exclusive profession, but a matter of broad public importance which is the proper interest of every educated man. Not only were the *Commentaries* a fascinating piece of literature; they were on the whole remarkably sound law. If we contrast his work with that of Coke we can see in Blackstone the completion of the process which Coke initiated. It is abundantly clear that the transition which Coke tried to effect from mediaeval to modern law was successful, for in Blackstone we see the final product—a united and coherent body of common law. The fact that such a large mass of legal detail was made available in one work, in an interesting and easily mastered form, made Blackstone's work particularly useful in eighteenth-century America. The *Commentaries* had a tremendous sale in this country, for not only did they contain some very useful matter on public law, but also served as the principal means of the colonists' information as to the state of English law in general. It was a happy coincidence that Blackstone had addressed himself to the interested layman who, although he might be a justice of the peace and a prominent figure in local government, was nevertheless not a trained lawyer. This was the very type of person who used Blackstone's *Commentaries* in America, where the legal profession was either viewed with disfavor or deliberately eliminated.

Blackstone was also deeply interested in the problems of legal education, but his efforts had more influence in America than in England. The Vinerian Professorship long remained unique in England, but in America it inspired the foundation of the Dane Professorship at the Harvard Law School, whose first occupant, Joseph Story, deliberately trod in the footsteps of Blackstone by writing a commentary almost equally famous, while Dane himself, like Viner, had compiled an *Abridgment*. The modern form of legal education as it exists in America, and has been more recently developed in England, is really a fulfilment of Blackstone's wishes.

PART III

EXTERNAL FORCES

CHAPTER I

THE CIVIL LAW OF ROME

For twenty-five centuries Roman law has had a continuous history of which only a relatively small portion lay in the middle ages or influenced English legal development. Into this complicated story we cannot enter. At the moment when it begins to concern us the classical Roman law had already entered upon its decline. With the fall of the Roman Empire the once universal system of Roman law depended for its continued existence upon custom, and it was largely in the form of custom that it continued to be applied during the middle ages. With the establishment of the new Teutonic kingdoms in the fifth century this aspect of Roman law was conspicuous; the problems raised by the clash of races were solved by a system of personal laws whereby each individual was subject to the law peculiar to his race—a system which still obtains in several parts of the world where numerous different races and religions are in close contact, as in Palestine. The barbarian kings, therefore, were put to the trouble of finding out the principal rules of this personal Roman law to which many of their subjects were entitled, and a number of texts from about the year 500 embody the results. Further east, Roman law retained to some extent its imperial character and in 438 portions of it were codified by the Emperor Theodosius. In the West, however, Roman law suffered the common fate of personal laws and rapidly degenerated in quality and diminished in quantity. It was inevitable that there should be cross influences: Roman law was modified as a result of neighboring customs, while on the other hand originally Germanic customs underwent a certain degree of Romanization. All through the middle ages, therefore,

there were two aspects of Roman law. First there was that of the pure academic doctrine which was from time to time revived through the learning of scholars; but in contrast with it there was the customary Roman law which had grown up in numberless communities all over Europe, and which had been modified in infinite variety according to local needs. Between these two aspects of Roman law there was not infrequently open conflict, for scholars naturally wished to restore the orthodox doctrine of classical times, and were apt to be impatient when less learned lawyers persisted in retaining the practical working-day law of their local communities. By this time there was no question whatever of academic Roman law being imperially enforced—the Holy Roman Empire itself bore little resemblance to the Roman Empire of the classical Roman law. The struggle between these two views of Roman law took place principally in the universities, and may be roughly described as an attempt made from time to time by certain law schools to influence practice. It may very well be that the great mediæval Romanists took too academical a view of the situation, and some of their attempts to restore classical law were ill-advised. Nevertheless it was they who accomplished the great feat of the middle ages in preserving classical law for many centuries during which it remained of ideal rather than practical value, until such time as society had sufficiently developed in thought and economic structure to be able to appreciate and make full and wise use of its ancient inheritance; while the more practical school of Bartolus and his followers made it still a body of living, growing law. It was the Romanists who maintained through the middle ages a scientific attitude towards law, and even in those cases where we find a scientific approach to bodies of non-Roman law it is, in fact, usually due to the example of the Romanists. Our own Glanvill and Bracton are eminent examples.

Until the close of the eleventh century, Western Europe had relied principally upon the Theodosian code and abridgments of it for an official text of Roman law, in the light of which it developed its various local Roman customs. Early in the twelfth century the great *Corpus Juris Civilis* of Justinian, which was a century later than that of Theodosius, began to be studied in Italy where it took a natural part in the great revival then going

on in various branches of culture, assisted no doubt by the new material prosperity of the Italian cities. Justinian's books were much larger and much more thorough in their return to classical Roman law than the code of Theodosius. In Constantinople there were greater facilities both in books, in tradition, and in spirit for an antiquarian revival — for to some extent this was the nature of Justinian's work; the jurists whose opinions figure most frequently in the *Digest* were as remote from his day as Coke is from ours. To the professors of the Law School of Bologna the books of Justinian came as a new revelation. At their head was the great Irnerius (died 1135) and around him were his pupils, including the famous "Four Doctors," Bulgarus, Martinus, Ugo, and Jacobus. Hardly less distinguished were Azo, from whom Bracton learned a great deal, and Vacarius, who traveled from Italy to the distant University of Oxford. There soon arose a school of glossators whose commentaries upon the books of Justinian were finally summarized in the thirteenth century into one great gloss by Accursius (1182–1260), whose son, Francis, visited the court of Edward I, attended a Parliament, and saw the enactment of a statute.[1] This academic movement in the end went too far; the refinements and subtleties of the doctors were too much for the common people who insisted upon retaining their imperfectly Romanized customs. A reaction therefore occurred and Bartolus (1314–1357), frankly recognizing the place which local custom actually held, and the difficulties created by local custom and local legislation (of which there was a good deal), applied himself to the study of the problems of statute law and conflict of laws[2] which were constantly arising in Italy in the course of inter-city commerce.

The next great revival of Roman law was in the sixteenth century, and began in the tiny University of Bourges which sprang into fame on account of its illustrious teacher Cujas (1522–1590). The origin of the movement was in the Renaissance and its object was pure scholarship, aiming at the restoration of classical Roman law and good Latin instead of the mingled custom and graceless language of the Bartolists. In the field of

1 The Statute of Bigamists (1 Statutes of the Realm, 42); see also 2 Stubbs, *Constitutional History* (1875), 107 n. 2.

2 For a translation of some of his remarks see Beale, *Bartolus on the Conflict of Laws.*

jurisprudence and legal history the School of Bourges exerted immense power, but practice was less amenable to university influence. This was fortunate on the whole, for however valuable the study of philosophy and legal history might be to the formation of a science of law, there was nothing to be gained by denying the experience of over a thousand years of legal development. As one example, the civilians introduced mischief in the sixteenth century when they attacked the transferability of debts as then universally practised by mercantile custom, on the ground that it conflicted with the law laid down a thousand years earlier in the books of Justinian.[1]

It now remains to indicate very briefly the principal points of contact between English and Roman law. As we have already remarked,[2] Roman influence begins in England with the coming of Christianity, and its specific influence upon Anglo-Saxon legal doctrine can be traced principally in the law relating to bookland. After the Conquest, England became once again a part of the European system, and Glanvill's treatise shows some familiarity with the Roman texts. No doubt one of the principal links between English law and Italy was Lanfranc. In the eleventh century he had taught in the Law School of Pavia; then he went to Normandy, founded the Abbey of Bec, and became the chief adviser of Duke William who brought him to England and made him Archbishop of Canterbury, which must have made him a very powerful source of foreign influence—it has been observed that *Domesday Book* itself is written in an Italian style of handwriting. Lanfranc's foundation at Bec influenced England for a long time; from Bec there came Anselm who precipitated the Investiture Contest in England; after him came another archbishop, Theobald, in whose household Thomas Becket had been trained, and who brought Vacarius to England.[3]

When we come to the reign of Henry II we find even more direct influences at work.[4] By this time we have to reckon not only with Roman law, but also with canon law which was partly a Romanization of the Church's customs, and partly an attempt to adapt Roman law to Christian and mediæval use. It may be

1 8 Holdsworth, 122, 123.
2 Above, pp. 6–7.
3 2 Holdsworth, 147; cf. 2 *ibid.* 133–137.
4 2 Holdsworth, 202–206.

that Glanvill's treatise was in imitation of some of the little books of canonical procedure which became frequent at this time, while Vinogradoff has suggested that there is significance in the fact that William Longchamp, Justiciar to Richard I, had written a short treatise on canonical procedure in which he urged the advisability of establishing definite *formulæ* of actions. It may be that this treatise had some influence in causing Glanvill to insist upon the importance of the original writ and to plan his book as a commentary upon writs and forms of action.[1] Already the canon law rules on the competence of witnesses were borrowed by Glanvill who used them as challenges to jurors. Glanvill also took pains to point out that when the King's Court uses the Latin word *dos* it does not mean the dowry of Roman law, but the completely different dower of English law, while at the same time he observes that there are differences between the English and the Roman law of legitimacy. He even gives us the different forms of contract known to Roman law, but immediately observes that the King's Court takes no notice of them. It seems clear that Glanvill anticipates that his readers will have some knowledge of Roman law, but it is equally significant that he frequently has to warn them against being misled by superficial resemblances. As we shall see later on, the principle of the assize of *novel disseisin* was deliberately borrowed from canon law, which developed it from Roman models.

When we come to Bracton, as we have already seen,[2] the problem of Roman influence, first upon Bracton himself, and secondly upon English law (these two different problems must always be carefully distinguished), raises many complicated questions. With the close of the age of Bracton the most influential period of Roman law in England comes to an end until we reach the sixteenth century, when it was raised in somewhat different forms.

On the continent there was the great movement called the Reception when once again scholars turned from the traditional mediæval Roman law to a fresh examination of Justinian's texts, and this time attempted to take an historical view of Roman law. The old feud between customary and classical law was once again revived and the Bartolist school had to fight hard for its victory.

1 Vinogradoff, *Roman Law in Mediæval Europe*, 88; 2 Holdsworth, 203.
2 Above, pp. 182–183.

The Reception on the Continent had its echo in England, and Maitland even went so far as to suggest that during the reign of Henry VIII the common law itself was in danger from the civilians. This view is certainly somewhat exaggerated.[1] However high a view Henry VIII may have taken of his position, it is clear that he regarded it as based upon the common law, and although with some difficulty he succeeded in managing his Parliaments, he was well aware of the important position Parliament now occupied as a national legislature and of the decisive influence which the common lawyers exercised in it. This combination of common law and Parliament made any substantial legal changes very difficult—as witness the events leading to the Statute of Uses.[2] But, as Professor Holdsworth remarks, although the continued existence of the common law was never in serious danger, yet its supremacy as the one and only legal system in England was vigorously challenged. The Councils and Star Chamber, the Courts of Request and Admiralty, made a high bid for jurisdiction over the whole of commercial law and portions of criminal law, and threatened to develop a constitutional law of their own. Chancery, too, became infected with the same spirit. During the middle ages equity was not regarded as being outside of the common law system, still less as essentially hostile to it, but at the beginning of the seventeenth century Chancery felt the attraction of the prerogative courts, and there was a real danger that the common law would be challenged by a rival civilian system developed in Chancery as well as in the prerogative courts. This situation was well understood at the time, and produced controversial literature which intelligently attacked the problem. In such a state of feeling there was no room for direct Roman influence upon English law. Indirectly, however, there was still opportunity for contact. As we have already observed, Bracton had looked very far ahead in several parts of his treatise. Questions then unsettled, fields of law with which the common law courts in his day refused to be concerned, he explored, taking Roman law as his guide. In the sixteenth century when lawyers were searching for help in expanding the common law, they

[1] Maitland, *English Law and the Renaissance* (reprinted in 1 *Select Essays in Anglo-American Legal History*, 168–207); the criticisms that follow are set forth in more detail in 4 Holdsworth, 253–262.

[2] See below, pp. 376 ff.

turned to the pages of Bracton. His book was printed for the first time in 1569; his imitator, *Britton*, had already been printed about 1534; and in both these works they came into contact with Bracton's Romanism which they found already adapted, more or less, to common law needs.

It is during the early and middle eighteenth century that Roman law once again exercised noteworthy influence upon English legal doctrine, and here too Bracton is the key to the situation. It is worth noting that a new edition was brought out in 1640. Lord Holt presided over the King's Bench from 1689 until 1710, and although he was in no sense a profound Romanist, yet he had been a careful student of Bracton, and through his decisions some of the academic speculations of Bracton became living common law.[1] A generation later Lord Mansfield carried on the work. The law of his native country, Scotland, had undergone the Reception and had thereby been considerably Romanized, but, as with Holt, it was his reading of Bracton as a student which turned his mind definitely to a study of Roman law at first hand.[2]

Even at the present day English courts upon occasion will refer to Roman law in something like Bracton's spirit in rare cases where the native law gives no guidance.[3]

[1] See above, p. 168.

[2] Above, p. 170.

[3] See Oliver, *Roman Law in Modern Cases in English Courts* (Cambridge Legal Essays) 243.

CHAPTER II

THE CANON LAW OF THE CHURCH

We have already casually referred to the growth of Church organization which accompanied the decline of the Roman Empire.[1] For a time it seemed as though the Church was the only body which could carry on the ancient tradition of universal law.[2] The sources, both official and unofficial, for ecclesiastical law, grew steadily in quantity and variety and at last proved overwhelming, not only in their bulk but also in the difficulty of assigning to each its proper value and sometimes even of determining its authenticity. The forces of feudalism had compelled the Church as well as the State to decentralize, and the result was a large mass of local ecclesiastical law. When the worst days were passed and the Church began to reorganize itself on the basis of the papal monarchy, it was a prime necessity to bring some sort of order into ecclesiastical law. In the eleventh century systematic research was undertaken in order to find authorities in canon law which were ancient and universally recognized; libraries were searched and it has been plausibly suggested that the discovery of the Florentine manuscript of Justinian's *Digest* may have been one of the results. Even so, the mass even of admissible material was enormous and its interpretation particularly difficult. A number of scholars attempted to collect the more important texts, to reconcile them with one another, and to unite them in one coherent commentary. One of the more successful of these attempts was that of Ivo of Chartres, whose *Decretum* appeared about 1095.[3] Ivo developed a distinction which assisted considerably in reconciling the discordant mass of material which lay before him.

[1] Above, pp. 2–3.

[2] Cf. the passage from Fournier in Pound and Plucknett, *Readings*, 68, 69.

[3] For the sources and literature of both civil and canon law, see Hazeltine, *Roman and Canon Law in the Middle Ages*, in 5 *C. Med. H.* 697–764. For very valuable accounts of their general influence see Meynial, *Roman Law*, and Le Bras, *Canon Law*, both in Crump and Jacob, *Legacy of the Middle Ages*.

Some rules, in his opinion, were fundamental, and must be preserved at all costs; others were more local, particular, or accidental, and although there might be reasons for their validity in particular cases, they must not be regarded as limitations upon fundamental rules of law. With this sensible notion a great deal could be done, for although it allowed plenty of room to legitimate exceptions, it nevertheless kept its eye firmly fixed upon broad principle—it was one of the conditions of mediaeval Christendom that canonists were bound to remember at every moment the inevitable conflict between rules and exceptions, and the thought of canon law was thereby greatly enriched.

At the same time the study of civil law based upon the newly discovered texts of Justinian was likewise flourishing, and all through the middle ages the canonists and the civilians were at odds. The two systems tended more and more to separate: the civilians looked to antiquity and were often tempted to become mere theorists or antiquaries, while the canonists were more concerned in adapting Roman law with great freedom to contemporary conditions, and in replacing its paganism by a Christian spirit. The civilians, too, were apt to take the side of the Emperor against the Pope. The study of civil law was forbidden to monks in 1180 and to priests in 1219; Henry III in 1234 ordered the sheriffs of London to close the schools of civil law.[1] These measures were ineffective in suppressing the study of civil law, but they succeeded in establishing the right of the canonists to develop their law in accordance with current needs as they understood them, without being bound by ancient authority. The systematization of canon law was carried still further by the great work of Gratian whose *Decretum* appeared very soon after 1140. Its general character is admirably expressed by the title which he gave it, "*The Concordance of Discordant Canons.*" So well did Gratian do his work that his results were accepted as being virtually final, and although his *Decretum* was unofficial and never received legislative force, yet in practice it was treated with great respect, and indeed has taken an undisputed place as the first portion of the *Corpus Juris Canonici*. It is also highly significant

1 Many lawyers qualified in both systems; hence the degree of LL.B.—bachelor of laws, civil and canon. Henry III retained in his service the great canonist Henry of Susa, usually called "*Hostiensis*" (*i. e.*, Bishop of Ostia); 1 *P. and M.* 122.

that just at this moment the famous Peter Lombard was publishing his *Sentences* which attempted something like the same task for theology; the appearance of these two books, the *Decretum* and the *Sentences,* marks the definite separation of canon law from theology. The papacy became increasingly active and a series of great councils added considerably to the body of universal canon law; thus the Third Lateran Council of 1179 established a system of cathedral schools and severely punished usury; the Fourth Lateran Council (1215) forbade clergy to take part in judicial ordeals,[1] and passed seventy chapters of reforming canons. The Pope also legislated by means of decretal letters which decided particular law cases and at the same time laid down general rules of law. Many unofficial collections of these *Decretals* were made, and at length an official compilation was published in 1234 with statutory authority by Gregory IX. The texts in this collection were arranged in five books, and when in 1298 another collection of those *Decretals* which were issued since 1234 became necessary, it was published as a sixth book and is therefore called *The Sext.* The last few pages are of interest to common and equity lawyers, for they contain a collection of maxims some of which became well known in the English courts. The *Decretum* of Gratian, the *Decretals* of Gregory IX, the *Sext,* and a few smaller collections, form the *Corpus Juris Canonici.* At the same time there arose a host of commentators, text-book writers and experts on procedure who have left us an immense literature. Throughout all this period the canonists were constantly endeavoring to make their system correspond as closely as possible with the ideal of Christian conduct, and to reduce to a minimum the divergence between law and morals. A great danger was that—

> "the purpose of the law might be defeated, either by malicious use of the powers it conferred or by artful evasion of the restrictions set by it on individual rights. Canonists and civilians were at one in forbidding acts of unfair competition, exercise of rights with the object of injuring another, . . . and acts in deceit of the law. Finally, since the law could not make provisions for every hypothetical case, the door was always open to custom. The danger of unauthorized rules was met by the canonists in this way: they declared custom to be binding only when it is reasonable, *i. e.,* when it is in accordance with the principles of the Church, and with the assumed intention of the legislator, and when

[1] See above, p. 106.

it has been in use for a sufficient length of time (*legitime prescripta*). The decision as to the presence of these qualifications lay with the judge. If proved to satisfy these requirements, a customary rule might, at least from the time of Gregory IX, supersede statutory law. Thus to the old rigidity of the civil law was opposed the equity of the canon law, exemplified in the intelligent, loyal, and benevolent interpretation and application of its rules. A system which allowed so much freedom to the legislator and which was tempered by so judicious a method of interpretation could and ought to possess great logical consistency, and it is this which gives its most striking feature to the law of the Church." [1]

Although a great deal of the Church's law was naturally concerned with its world-wide organization, the powers and duties of the various ranks of clergy, and the spiritual discipline of churchmen, both regular, secular and lay, nevertheless a great deal of it did affect the daily life of the laity in a variety of ways, and in the end exerted profound influence upon the development of national laws. The most important, no doubt, is the law of marriage, which is of fundamental importance in every society. In the law of wills the Church succeeded in greatly simplifying the civil law on the subject, while it also influenced the law of intestate succession. On this latter subject the views of the Church were singularly modern, for she opposed the feudal notions which excluded women from the inheritance of land, and urged that land and chattels should descend along similar lines. As we shall see later, the Church also took up the idea of protecting possession as such, and developed a series of possessory remedies. Although the theory of possession and ownership was no part of the English law of land, yet the canonical idea was easily adapted and a recent disseisin was protected by Henry II's Assize in the same way as a recent dispossession in canon law. In connection with the theory of possession the Church also modified the Roman law of prescription by insisting that good faith was absolutely necessary not only at the commencement but all through the period upon which the prescription was founded. "The civil law punished the negligence of the owner who did not possess: the canon law reproved the sin of one who sought to prescribe without good faith." [2]

In the field of contract the Church's contribution was most

1 Le Bras, *Canon Law* (in Crump and Jacob, *Legacy of the Middle Ages*), 328, 329.

2 Le Bras, *op. cit.* 351.

notable, for here again the Christian conception of good faith was employed to great effect. At every opportunity the Church freed the law of contract from formalism, and finally declared, in spite of the Roman maxim *ex nudo pacto actio non oritur,* that a simple promise was enforceable. It must have needed a great deal of courage to reach this position when against it was all the authority of Roman law and the custom and practice of most of the other systems of secular law.

The Church also attempted—and here she was, for the time being, less successful—to impose her view upon economic life. The attempts to suppress usury are well known; they are in fact part of a general theory of wages and profits which looked with favor upon the products of labor while it regarded as suspect the profits of speculation, banking, and finance. Acting from the same point of view, the Church discountenanced the fluctuations in wages and prices caused by the law of supply and demand, and attempted to maintain fixed standards of value. On the other hand, the liberal and equitable view which the canon lawyers took of contract considerably aided the development of commerce in other directions, for it did not confine contract within the limits of the civil law of a remote age; insurance and the assignability and negotiability of debts are striking examples of matters which the canonists developed on the basis of good faith, but which the civilians refused to touch. Similarly the canonists developed a summary procedure which was widely copied by other systems (defined in the famous decretal *Sæpe* in 1306), and here again the canonists broke with formalism in an earnest attempt to do speedy and substantial justice.[1]

In the field of criminal law the Church also made a notable contribution by insisting that crime should be treated from the point of view of sin, and consequently the theories of the moral theologians concerning the place of intention in sin became part of the law of crime. Mediæval punishments were frequently cruel, and in many cases capital, but the Church introduced the idea of imprisonment in an endeavor to bring the offender to repentance through solitary contemplation. As part of her criminal procedure she adopted and modified the civilian criminal procedure,

[1] For the text and some comments see Engelmann (ed. Millar), *History of Continental Civil Procedure,* 495.

and here again a great deal of formalism was abandoned and much was left to the discretion of the judge in examining witnesses and weighing their evidence. Even after the Reformation had struck a seemingly heavy blow at the canon law, its influence was still powerful, for the Bartolists had been glad to embody in their system of civil law a good many ideas drawn from the canonists, and so the Reception was often as much a reception of canon as of civil law.

During the middle ages the Church was the one body which exercised universal jurisdiction, and which therefore could act as a bond of union between the divergent forces of the day, and the unity which she achieved has had lasting results upon law. As it has been admirably expressed by Professor Le Bras:

"The ideas of good faith and equity which underlay the canonist theory of contracts still influence the legislators of to-day, and those shrewd conceptions of the just price and a just wage are more vital than any system that has been practically applied, because they express our permanent ideal. Thus the present is linked to the distant centuries of Innocent III and Gregory VII; and indeed even to those more distant, for many of the ideas which bore fruit in the classic age were the heritage of past civilizations. The care of the poor and the oppressed which was characteristic of Judaism, the Roman love of order and authority, the Greek conceptions of political economy and formal logic, the enthusiasm and scrupulousness of the Celts, which were shown more particularly in their penitential system,—all these conquests of the human mind, which seemed to her in accordance with her fundamental principles,—went to the enrichment of the Church's law, and were assimilated to her own doctrine after such modification and correction as was required to bring them into harmony with her own point of view. It is indeed the highest moral tradition of the West and of the Mediterranean peoples which has been gathered up and handed down to us in the classic law of the Church." [1]

[1] *Legacy of the Middle Ages*, 361.

CHAPTER III

THE LAW MERCHANT

The story of commercial and maritime law as it developed in ancient and mediæval times is of particular interest. Many nations contributed to its formation, until finally there grew up a truly cosmopolitan law of commerce at the very moment when other law was becoming national rather than international.

For a long time the administration of commercial and maritime law rested in the hands of local jurisdictions. Seaport towns had their own maritime courts sitting on the seashore from tide to tide, but the only ones which survived in active working in England into modern times was the jurisdiction of the group of five towns called the Cinque Ports which is the oldest maritime jurisdiction in England.[1] The other local maritime courts in the end were superseded by a newer and more centralized jurisdiction, the Courts of Admiralty, held in the name of the Lord High Admiral who was appointed by the Crown.[2] The earliest distinct reference to a Court of Admiralty in England is in 1357. At this moment the law administered by Admiralty in England was a body of customs which began in the twelfth century in the little town of Oléron in Gascony,[3] whence they spread to the seaports of Normandy and Brittany and then to Flanders and England. The city courts of London referred to the laws of Oléron early in the fourteenth century. This became for a while the customary law of the northwest coast of Europe; the Mediterranean ports in the meantime had developed another body of custom at Barcelona which is known as the *Consolato del Mare.*

Mercantile courts followed something like the same general history. In England as elsewhere they were numerous and local. Markets and fairs had their own machinery for carrying out

[1] They were Hastings, Romney, Dover, Sandwich and Rye.

[2] For a time there were several admirals and therefore as many courts.

[3] Oléron (with the rest of Guienne) came to Henry II in right of his wife Eleanor.

commercial law; most famous of them are the courts of piepowder, which were specially concerned with wandering merchants who traveled from market to market. The name seems to have been at first a nickname referring to the dusty feet of its clients, but was later accepted as the official style of the court. The English courts of piepowder closely resembled similar courts on the continent, but just as the royal Admiralty superseded the local maritime courts, so a system of royal courts was set up by statute at various times in the fourteenth century which competed seriously with the local mercantile courts. These were called courts of the staple.[1] These mercantile courts, however, still for a very long time continued to administer a peculiar type of law called law merchant. It was not until the eighteenth century that the law merchant became completely absorbed in the common law; and so England like Rome, and unlike the rest of Europe, had one and the same law for all types of civil business, mercantile and otherwise.

In the end, the mercantile law of the future came not from Northern but from Southern Europe, and we must now trace the development of mercantile and maritime law in the Mediterranean countries.

The process which was going on was a movement from local law towards a cosmopolitan law, and this process was not completed until the close of the middle ages. The factor which promoted the change was, of course, the international character of commerce which necessarily brought merchants of different countries into contact with one another in the great fairs and seaports. Then, too, the smallness and weakness of many of the states had given rise to the formation of guilds of merchants who acquired considerable privileges. These privileges naturally grew in extent as commerce increased and spread over a wider area. Unification was further assisted by the dominant position in Mediterranean trade acquired by certain Italian cities, and consequently the spread of their particular customs. Many towns organized research in comparative legislation and entrusted to officials called *emendatori* or *statutarii* the task of examining the laws and customs of other communities and recommending the adoption of

[1] Statute of the Staple, 27 Ed. III. st. 2 (1353) consolidating earlier enactments.

those features which seemed to them desirable. There was, therefore, a deliberate attempt to promote uniform legislation. The Church, too, was exerting a growing influence upon mercantile practice. And finally, there came the great Reception of Roman law which provided a scientific apparatus for the development of mercantile law, which, however, remained in substance deeply tinged with canonist doctrine.

The institutions which administered commercial and maritime law were civic authorities in numerous Italian towns who frequently had the title of consuls. They appear in Milan in 1154 and seem first to have been officials of a guild merchant, although their importance soon made it necessary for the cities to associate themselves with the work. The seaboard cities had also their maritime courts which in some cases exercised a general commercial jurisdiction as well. A number of bodies of maritime law were developed, and most important among them was the *Consolato del Mare* which grew up at Barcelona and spread to various parts of Europe, following the jurisdiction of the Kings of Aragon who laid claim to Sicily and various other places. They were put into print at a very early date and were translated into Italian and Castilian. In the sixteenth century they were translated into French, in the seventeenth into Latin, and in the eighteenth into Dutch and German.

We must now consider the law which these bodies administered. They exercised a very wide power of regulation—and the middle ages thoroughly believed in the public regulation of every sort of activity. The only restrictions imposed upon them were the law of the city authorities which must not be contravened, a general requirement of reasonableness, and a restriction to purely mercantile matters.

"Subject to these conditions these powers were extensively used. The qualifications of practising lawyers, the businesses of bill-broking, banking, and pawnbroking, the equipment, licensing, loading, and registry of ships, the nature and variety of papers which trading ships must carry, the business of underwriting—occupy a large space in the statutes of the Italian towns. Besides, there are detailed rules for the conduct of all the different wholesale and retail trades carried on in the town; and some of these rules are very similar to the rules made by other towns in Europe—in Italy, as elsewhere, the law intervened to secure honest and skilled workmanship, reasonable prices, and fair wages. But the greater volume and the more elaborate organization of trade gave rise

to elaborate regulations upon such matters as shipping, banking, insurance, and bills of exchange, some of which do not appear in England till quite modern times."[1]

Besides developing law and applying discipline to members of the estate of merchants, there were also other matters of a diplomatic character which the consuls undertook. Treaties and commercial conventions with other communities were frequently negotiated, while down to the fourteenth century they were frequently engaged in reprisals. This meant that if a merchant was unable to obtain justice against a foreigner in the foreigner's court, then his own government would authorize him to recoup himself out of the property of any merchant of the foreign country in question whom he could find. The foreigner was then left to take the matter up with his own government if he could. This system was, of course, extremely inconvenient. Nevertheless it was widespread; even in England we find different cities taking reprisals against one another, justifying it on the custom of merchants.[2] By the fourteenth century reprisals become much more rare.

The sources from which these Mediterranean cities developed their commercial and maritime law were very various. There was ancient custom expressed in the Rhodian sea law; there were also the legislative acts of the eastern emperors (called *Basilicas*); there was the civil law, and modifying it as a sort of equity there was the canon law;[3] while for their procedure the summary methods of the canonists, based upon the decretal *Scpe*, were made the basis of mercantile procedure.

While this was going on in the prosperous and active Mediterranean trade, a somewhat similar but much slower development took place in Northern Europe. As an example we may take the development of mercantile law in England. By the end of the fifteenth century the English mercantile courts had developed a few principles, and from the occasional records which survived we can see how they worked in practice. The courts of the fairs in England show us numerous actions upon contracts of sale which

1 5 Holdsworth, 72, 73.

2 For the abolition of this rule in Kent, save merchant towns, in 1259, see the remarkable document in Jacob, *Baronial Rebellion*, 351, 352.

3 See Straccha, quoted in 5 Holdsworth, 80 n. 7.

had been concluded by the payment of earnest money or God's penny. Warranties of quality were enforced if express; but warranties of title were not yet presumed. The defence of innocent purchase for value in an open market was certainly good against a criminal charge of theft, but it was only at the close of the fifteenth century that it gave a good title to the purchaser against the original owner; this rule was virtually reached by 1473. We also find that impeding a sale gave rise to an action in tort; some simple cases on partnership appear; brokers figure prominently both as binding their principals in contract and also as suing for their fees and commission—and in this last connection lawyers are on the same footing. And finally the merchant courts impose a heavier liability both in contract and in tort than did the common law upon masters in respect of their servants' acts.

In the course of the sixteenth century the centralizing tendency which affected all aspects of English legal life had its effect also upon the mercantile jurisdictions. Like other local institutions, the courts of the fairs and the mercantile boroughs rapidly declined, their place being taken by central institutions, and finally by the common law itself.

Not only was there a change of jurisdiction which shifted from local to central courts, but there was also a change in the law itself. At the close of the fifteenth and the beginning of the sixteenth centuries we had in England a Reception of the Italian mercantile law, and a century later, in the first years of the seventeenth century, Coke will be able to say that "the law merchant is part of the law of this realm."[1] This Reception was effected largely through the prerogative courts. Italian influence had always been strong in English finance, and when the revival of Roman law spread over Europe in the sixteenth century the Mediterranean mercantile customs, together with their civilian and canonist aspects, accompanied it. This Reception was general in Northern Europe and it was obviously prudent that England should follow suit, if, as the Tudors always maintained, England was to develop its place in European trade. This Reception was partly effected by statute; admiralty jurisdiction was enlarged in 1540;[2] in 1601 a statutory court was erected to hear

1 Co. Litt. 182.
2 32 Hen. VIII, c. 14.

cases of insurance,[1] while special machinery was also devised for bankruptcy and insolvency proceedings. It was the Council, however, which had most influence. All through the middle ages the Council had made itself the protector of foreign merchants for the obvious reason that dealings with them frequently raised matters of international politics. The Council developed this position, and in the later sixteenth century acquired a considerable commercial jurisdiction both original and also of a supervisory character over other courts, such as Admiralty. Civilians were regularly called in to assist the Council, while common law judges upon occasion would be consulted too. This jurisdiction of the Council in the later sixteenth century was matched by that of the Star Chamber in the earlier part of the century and for obvious reasons.

The Court of Admiralty has left us regular records from the year 1524, and it is clear that it exercised a steady and direct influence upon both commercial and maritime law. Its procedure, however, was of the slower civilian type and not that of the continental jurisdictions which operated under the decretal *Saepe*. Nevertheless, the English Court of Admiralty acquired a familiarity with negotiable instruments, insurance, charter-parties, bills of lading, and other commercial business of which the common law knew nothing. The other prerogative courts were less important in this connection, although the accident that most of the judges of the Court of Requests were also admiralty lawyers temporarily gave the Court of Requests a certain amount of admiralty jurisdiction by delegation from the Council. Chancery was principally concerned with partnership (for it had facilities for investigating accounts), and bankruptcy.

These prerogative courts contained a strong element of foreign-taught civilians, and so there was a general Reception of the Romanized Italian mercantile law in England. We have already mentioned, however, that the common law judges were frequently present at conferences, and this may have tempted the common lawyers to try to acquire this jurisdiction for themselves; when Coke came to the bench he deliberately set himself to cripple the Court of Admiralty and to capture mercantile law for the common lawyers. Prohibitions were constantly issued to the Admir-

[1] 43 Eliz., c. 12.

alty and other mercantile courts, while by a daring fiction which begins to appear frequently in the sixteenth century the common law courts assumed jurisdiction over acts which took place abroad, by the simple device of describing the place as being "in the parish of St. Mary le Bow in the ward of Cheap." This allegation was not traversable. In this way the common law began to capture the field of mercantile affairs, but for a long time it regarded itself as administering a strange and foreign law. It viewed the matter from the standpoint of custom; it was prepared to administer mercantile custom when that custom had been proved. Each case, therefore, had to allege the existence of a mercantile custom and then establish it by a jury of merchants. By the close of the seventeenth century the constant repetition of finding mercantile custom in each case that arose was seen to be unnecessary, and the courts began to take notice of some of the more notable mercantile customs without requiring proof of them, and this policy was finally adopted as a general practice by Lord Mansfield. In this way the mediæval English mercantile custom administered by local independent courts gave way first to more centralized institutions such as the staples and the Council, and then later the custom itself was superseded by the reception of Romanized South European mercantile and maritime law which took place in the admiralty and prerogative courts. This essentially foreign body of law was subjected to common law jurisdiction by Lord Coke at the beginning of the seventeenth century, and was finally made a part of the common law in the middle of the eighteenth century by Lord Mansfield.

A few brief words may now be said upon the content of this Italian law merchant which the English courts received, and first as to bills of exchange. All through the middle ages attempts were being made to make debts assignable and if possible payable to anyone who was the bearer of a document. The principle was widespread; in the year 771 a monk gave to a church, "or the bearer of this document," the right of avenging his death and collecting the *wer* if he were murdered; in 1036 a man left by his will the guardianship of his wife to two relatives "or to whoever shall bear this writing." In mercantile affairs this device became a common feature of promises to pay. They were first drawn in favor of a named payee "or his attorney," and in such cases a

formal deed of attorney would be necessary to entitle anyone except the payee to sue upon the instrument. Later still the mere production of the document was accepted as sufficient authority entitling the bearer to sue, at first in the name of the payee, and later in his own name. Documents of this type were common in the thirteenth and fourteenth centuries, but in the fifteenth century the validity of written promises to pay made out in this form was questioned, save in the single instance where the bearer was the properly constituted attorney of the payee.

"Probably this difficulty was especially keenly felt by the French lawyers, because the Renaissance school of jurists, which was especially influential in France, endeavored to get back as far as possible to the classical texts. They therefore rejected many of those modifications of pure classical doctrine which the influence of the older customary law, and commercial convenience and practice, had caused the school of the glossators to accept. But the difficulty was not confined to the French lawyers. It was felt in Italy, and indeed in all countries in which Roman law was received, in proportion to the extent to which the doctrines of that law gained supremacy. The lawyers were at once learned in the classical texts of Justinian's *Corpus Juris*, and ignorant of the modern mechanism of commerce. They did not hesitate, therefore, to sacrifice commercial convenience on the shrine of legal orthodoxy—even suggesting that the merchants purposely adopted obscure forms in order that illegal transactions might pass unnoticed. On the other hand, the technical difficulty was not felt so keenly in Northern Europe, nor, as we shall see, in England. It is probable that in these places the older ideas lived on and saved the lawyers the trouble of finding a new speculative basis, consonant with the doctrines of Roman law, upon which the peculiar characteristics of negotiable instruments could be based." [1]

The future lay rather in the development of "exchange" than in the promise to pay (or "writing obligatory" as it was called). "Exchange" was at first the simple process of changing one currency against another, but there soon grew up an organization of international bankers having agents or correspondents in the principal commercial centers, and these firms, instead of actually delivering coins of one type in exchange for coins of another, would write a letter of exchange to their correspondents, effecting the transfer purely on paper. With an international organization they quickly realized that the transfer of money between various countries could be effected by merely transferring balances, setting off a credit balance in one country against a debit balance in

[1] 8 Holdsworth, 122, 123.

another. A merchant who wished to remit money abroad would therefore address himself most usually to one of these bankers. The remitter A therefore secures from his banker B (in exchange for money paid to him) a bill drawn in foreign currency by B upon C, payable to D. B and C are very often partners or agents of the same international bank. Under the ordinary form this arrangement would be embodied in a formal deed. Already in the fourteenth century, however, the formal deed began to be replaced by the informal letter of advice which accompanied it; it is this letter of advice which eventually grew into the modern bill of exchange.[1]

So far we have a document which enables A to effect a payment to D in a foreign country without transporting money, but this document is payable to D only, and is in no sense negotiable. Late in the sixteenth century the habit grew up in Italy of drawing bills of exchange in favor of a payee or order, whereupon the payee would endorse the bill with an order to pay X as agent of the payee. This was one step further in the development of transferability, but X was still unable to transfer further. The payee's order was X, and not any other person whom X might name.

In the middle of the seventeenth century it became established that one endorsee can endorse over, and so bills become assignable by successive endorsement; but the theory still prevailed that an endorsee was agent of the payee. However, the fact that the endorsement and delivery served instead of a power of attorney, and gave the endorsee the right to sue, made it look as though the endorsee sued in his own name—and so the lawyers compromised by calling him an agent although in respect of his own property (*procurator in rem suam*).

At the same time—in the middle of the seventeenth century—lawyers began to make certain presumptions in connection with bills of exchange, notably that an acceptance was for value. Having once begun to make presumptions it was easy to carry the process further; a further presumption was made that the bill was in good order (*omnia rite acta*), and this presumption could not be rebutted so long as the holder took in good faith, the result being that a *bona fide* holder for value was protected against prior

[1] The later bill of exchange also was often accompanied by a "letter of advice."

irregularities. By this time the wave of academic enthusiasm for the letter of classical Roman law had spent its force, and the bill of exchange became finally established in substantially its modern form, and with the modern characteristic of negotiability.

The history of bills of exchange in English law is the history first of the reception of Italian practice among English merchants in the sixteenth century. The progress of this reception can be traced by noting the changes which appear upon comparing the treatise of Marius (1651) with that of Malynes which appeared in 1622. In the interval between these two works it is clear that great developments took place in English mercantile practice, which now follows closely the stages of continental development. In England as on the continent we see the sixteenth-century writing obligatory drawn to bearer—and another common custom was to draw them in blank leaving the payee's name to be inserted later. This was superseded in the middle of the century by the bill of exchange, and upon this we have a fair amount of information in the records of the Court of Admiralty, which concerned itself with these documents. Malynes shows us the old four-party bill which we have described, which was not yet payable to order or bearer. Marius shows us the three-party bill in its modern form which was transferable, and also available for internal as well as in foreign trade—for there had long been doubts whether a bill of exchange could be used in domestic commerce.

By the middle of the sixteenth century, therefore, English merchants were accustomed to the use of the continental bill of exchange as it then existed, and if litigation arose there was the Court of Admiralty in which to sue. From time to time, however, attempts were made to sue at common law upon bills of exchange, using the action of *assumpsit*. The books of entries[1] of the second half of the sixteenth century contain pleadings for this purpose, and in 1602 we find the first reported case of *assumpsit* being brought on a bill. The early forms show that there was some difficulty in pleading a bill of exchange in terms of the common law. Matters were soon greatly simplified by merely stating the facts of acceptance, endorsement, and so on, and then resting the case upon the custom of merchants. In this way there was no need to express in terms known to the common law the rights and

[1] These were collections of specimen forms of pleadings.

liabilities of all the parties to a bill. This practice becomes general from 1612 onwards. The next step logically followed; once the common law courts were familiar with the nature of a bill of exchange, it was no longer necessary to plead specially the custom of merchants. This great change was largely due to Lord Holt. During the period when he sat as Chief Justice of the King's Bench we find that the negotiability of bills of exchange was recognized at common law. His decisions laid it down that a bill drawn to order could be transferred by endorsement, that the title of a *bona fide* holder was not invalidated by defects in the title of his transferrer, and that consideration will be presumed.

In the seventeenth century merchants did not draw a very sharp distinction between bills of exchange and the old writing obligatory, which now became simplified in form as a promissory note. In mercantile practice they negotiated notes in the same way as bills, but, as we have seen, the writing obligatory was a very old form and therefore associated in men's minds with very old law, and the common lawyers like the civilians had technical reasons for holding that promises to pay were not transferable save to attorneys. Lord Holt refused to recognize the promissory note as being on the same footing as a bill of exchange in the famous case of *Buller* v. *Crips*.[1] Holt's view was that these promissory notes were a novelty invented by the goldsmiths, whose practice was to accept money from their customers on deposit, giving in return a promissory note which they hoped was negotiable. The goldsmiths were doing in a less convenient way what a modern bank does in accepting a customer's money, only to-day, instead of always issuing notes, the bank undertakes to honor its customer's checks. In so far as promissory notes were used in this operation Holt maintained that they represented an attempt by Lombard Street to dictate law to Westminster Hall. There was also a good deal of technical force in Holt's argument that the same result could be obtained through a bill, and that while the bill of exchange had a proper place in the common law, the promissory note had not. He therefore refused to allow an endorsee to sue on a promissory note. Nevertheless mercantile

[1] 6 Mod. 29 (1704); Pound and Plucknett, *Readings*, 219–221.

opinion in favor of notes was so strong that a statute was passed expressly making them negotiable.[1]

At this point we reach the beginning rather than the end of the story. Future development lay in the direction of elaborating the idea of negotiability and applying it to a great variety of documents, some of them of very recent origin. Although a large number of negotiable instruments have arisen in modern times, yet the really fundamental idea of negotiability was established in the seventeenth century, and the greatness of that achievement can only be appreciated with reference to the vast modern developments which it made possible.

Space forbids more than mention of the many other contributions which the custom of merchants made. Insurance has a long and interesting history, at the first maritime and then general, and so, too, has the law of partnership of which many varieties were known during the middle ages, enabling large international banks and financial houses to conduct their operations, while in the seventeenth century the partnership or company is expanded into the trading corporation.

[1] 3 & 4 Anne, c. 9 (1704).

CHAPTER IV

EQUITY

Of the rise of the jurisdiction of equity we have already spoken in tracing the history of the courts;[1] it now remains to consider the origin of the rules and doctrines which equity administered, and the basis upon which equity assumed jurisdiction. If the origin of the Chancery as an institution has been much disputed, then the origin of the doctrines of equity is still more controversial. There is no space here to enter fully into these discussions, and so we shall be content with an outline of the theory which seems to us most probable.

During the middle ages it was not yet apparent to contemporaries that there were or could be two different and sometimes conflicting systems in England, one of them common law and the other equity. They were, however, well aware of conflicting courts, and on numerous occasions complaints were heard that the Chancellor, the Council, the Admiralty, the steward, the constable, and other authorities had exceeded their jurisdiction. The principal common law court in the middle ages was the Court of Common Pleas, in which the serjeants had a monopoly which was of great value. They had, therefore, every reason to protest against the attraction of business into other jurisdictions where they had no peculiar advantage. Occasional bickerings between the common law courts and the Chancery must not be taken as indicating that law and equity were two different systems based upon different conceptions of justice. On the contrary, it seems a fact that during the middle ages the Council and the Chancellor were most concerned with the *de facto* rather than the *de jure* failings of the common law courts. It is equally true that in the twelfth and thirteenth centuries, and even as late as Edward II, common law courts exercised powers which in later ages were peculiar to equity. The exercise of these powers by the Chancellor does not therefore imply any principle which is necessarily

[1] Above, pp. 138–139.

alien to the spirit of the common law, for the common law courts themselves had once exercised them.

This has been admirably demonstrated by Professor Hazeltine who observes numerous points upon which equity was anticipated by the common law courts.[1] There was a moment when it seemed likely that uses in land might be enforced by the action of covenant and uses in chattels by account and detinue. In Henry II's reign we find something like an equity of redemption recognized by the King's Court which had vanished, however, by the reign of Edward I. Then, too, in a famous case Chief Justice Bereford proposed to give relief against a penalty as late as 1309: "What equity would it be to award you the debt when the document is tendered and when you cannot show that you have been damaged by the detention?" he asked. And again: "Moreover this is not properly a debt but a penalty; and with what equity (look you) can you demand this penalty?" And so Bereford told the plaintiff that if he wanted judgment he would have to wait seven years for it. It is true that this case is almost unique, and that Bereford was a judge of remarkable originality and courage; but it is still apparent that there is nothing inconsistent with the common law in the idea of limiting recovery of penalties to the measure of damages actually sustained, if such there were. When we come to the question of specific performance it is important to observe that some of the oldest common law actions were of this character. The action of covenant will give specific restitution to a lessee whose lessor has broken the agreement; so, too, covenants to convey land, the provisions of final concords, the obligations of warranty, and obligations to perform or to acquit "foreign service" (a matter of great complication in feudal law) were enforceable at common law by actions which went much further than giving damages, for they concluded with judgments that the defendant was to perform the obligations to which he had been proved liable. Once again, then, it is clear that there is no very great reason in the nature of things why common law should confine itself to an action for damages—save that in all these matters the great difficulty of the common law lay in the ancient rule which only allowed it to enforce its judgments by distress,

1 The following remarks are based on his paper, *The Early History of English Equity* (in *Essays in Legal History*, ed. Vinogradoff).

and not by imprisonment on the ground of contempt of court. Then, too, there were occasions upon which the common law would issue what is really an injunction under the name of a writ of prohibition restraining a party from committing waste in a variety of circumstances; upon breach of this prohibition the party is attached to show cause; even in the seventeenth century this aspect of the common law was highly praised by Coke who says of prohibitions of waste, "this was the remedy that the law appointed before the waste done by the tenant in dower, tenant by the curtesy or the guardian, to prevent the same, and this was an excellent law—and this remedy may be used in this day." Then in 1308 we find an interesting case where a lord secured a judgment forbidding his tenants from selling their goods elsewhere than in his market; and similar judgments could be given on questions arising out of suit of mill, whereby tenants could be compelled to grind at the lord's mill. As Maitland has remarked, "if this is not an injunction, and a perpetual injunction, we hardly know what to call it." Professor Hazeltine has observed:

"The early common law jurisdiction *in personam* by means of prohibitions was not narrow. . . . Parties were not only ordered not to commit waste, not to commit nuisance, not to sell land, not to distrain the plaintiff to do suit of court, not to destroy the wood in which the plaintiff has housebote and haybote, not to expose wares for sale elsewhere than in the plaintiff's market, not to sue in the ecclesiastical courts; but parties were ordered to repair walls and buildings, to erect houses, to place property in the same condition in which it had been, and to remove existing nuisances."

Closely connected with the writs of prohibition were the writs *quia timet*, which, like the Chancery bills of the same name, aim at preventing a wrong which is threatened before it occurs.

From all this it is clear that many of those features which were later characteristic of equity were once a part to a greater or less degree of the earlier common law. There was, therefore, no fundamental inconsistency between equity and common law; the one was not alien to the other. Professor Hazeltine summarizes these results as follows:

"Enough has already been said, I hope, to indicate that not all the ideas which we associate with English Equity were either borrowed from the Roman system by the Chancellors or original with them. The advent of the Chancellor as a judicial officer of the Crown was at a time

when the older tribunals, although expanding their own system to meet the needs of a growing society, were nevertheless fettered in their powers by statute and precedent as well as by the conservatism and technicality of the legal profession. The Chancellor's court, exercising very wide discretionary powers, gradually developed the elaborate and effective system of rules and principles which we of the twentieth century know as English Equity. But, while fully recognizing the achievements of the Chancery, let us not forget that the new tribunal built partly upon the older practice of the common law and other courts whose equitable jurisdiction it supplanted. The new tribunal did not originate English Equity, for it simply carried on the work of the older courts by developing in greater fullness and with a different machinery the equity inherent in royal justice." [1]

Various suppositions have been advanced as to the origin of the Chancery bill, and it is now clear that at least one suggested origin, the bill in Eyre, must not be considered as the ancestor of the Chancery bill. "Bill" was a very general word with hardly any technical significance, and bills were in fact used at common law in a number of circumstances where the formality of an original writ could be dispensed with, particularly where the defendant was either an official of the court or already under the court's jurisdiction as the result of previous proceedings; examples are the bill of deceit, while in modern times the bill of Middlesex became famous. The bill in fact is no more than a letter or a petition, or sometimes even a brief and informal memorandum of the plaintiff's complaint. The bill in Chancery is best regarded as derived from the petition to the Council or later to the Chancellor himself.

Just as the bill or petition was a prayer for administrative intervention,[2] so the next step in the process, the *sub pœna,* was also drawn from administrative origins. There seems even to be a trace of such a writ at common law; in 1302 Justice Berrewyk ordered a party to bring an infant before the court "under pain of one hundred pounds."[3] In the middle of the fourteenth century the Council produced an effective writ by adding the clause of *sub pœna* to the somewhat older writ of *certis de causis* which was in effect a simple summons to appear before the Council "for certain reasons." The great objection which common lawyers

1 *Early English Equity* (*Essays in Legal History,* ed. Vinogradoff) 285.
2 Above, pp. 138–139.
3 Y. B. 30–31 Edw. I, 302 (Rolls Series).

made to writs in this form was their failure to mention the cause of the summons. It was a principle of the common law that a party should not be brought into court without due notice of the matters which he would have to answer, and there is no doubt that the *sub pœna* gave no such warning. On the other hand, it must be remembered that in most cases the party must have known the real reason for his summons, for litigation as a rule is preceded by private negotiations, and in any case, having appeared, he was given ample time to prepare his defence. The best defence, however, for the Chancery's practice, must no doubt be sought in the fact that the common law was a warning example of the mischief which might result if a plaintiff were compelled to state his cause of action in the originating writ, with the almost inevitable consequence that he was unable to make any change once the writ was issued. It was, no doubt, the deliberate policy of the Chancery to avoid this situation, and this policy it constantly adhered to, as witness the freedom with which Chancery pleadings could be amended.

So far the early history of equity has followed very much the same lines as the history of the common law three hundred years earlier. The common law gradually made a place for itself, although the country was already well provided with an ancient system of law courts; its intervention was at first political and administrative, being designed to safeguard the feudal supremacy of the Crown and even to exploit that situation; its process, the original writ, was of administrative origin, and in its oldest form, the *præcipe quod reddat*, undoubtedly encroached upon the sphere of already existing institutions. And so it was with equity. It imposed itself in spite of the existence of a well-ordered common law system; the basis of its intervention was at first the enforcement problem of the later fourteenth and fifteenth centuries, the preservation of order and the defence of the weak against the strong, together with the correction of the real or supposed defects of the common law; its process by bill and *sub pœna* was not in its origin judicial but part of the administrative machinery of the Council; and there was no doubt that the common lawyers had grounds for regarding equity as encroaching upon their province.

During the middle ages we do not hear very much of "equity,"

although Chancery and Council are constantly mentioned. It can hardly be said that the modern idea of equity appears until the sixteenth century when we find a formal theory in *Doctor and Student* upon the relation of equity to law. It remains to be seen whether the legal theory expressed in that remarkable treatise was not in large part the origin of the English idea of equity, rather than a mere historical description of already existing thought. In the fifteenth century when the Chancellors were regularly ecclesiastics, it may well have been that they wielded the royal prerogative through the machinery of the Council in accordance with canonical ideas. This does not necessarily mean that the Chancellors were deeply learned in the technicalities of canon law; it may very well mean, however, that they acted in the spirit of the canon law, which, as we have seen, was impatient of pedantry and inclined to place substance before form. In any case the ecclesiastical Chancellors were certainly not common lawyers, and it must have been a perfectly natural instinct, then as now, for a bishop, when faced by a conflict between law and morals, to decide upon lines of morality rather than technical law. As a Chancellor (Cardinal Morton) said in 1489, "every law should be in accordance with the law of God; and I know well that an executor who fraudulently misapplies the goods and does not make restitution will be damned in Hell, and to remedy this is in accordance with conscience, as I understand it."[1] This was all the more easy in the fifteenth century when under the Yorkist kings the increased power of the Crown was largely accepted by the nation voluntarily as a sort of dictatorship which alone could be effective in restoring law and order. It will be seen that there is a wide difference between a jurisdiction whose philosophical basis is the idea of conscience (such as the classical equity developed) and the Yorkist jurisdiction which was much more administrative than judicial and based upon the elementary duty of governments to maintain order through administrative forms. The transition from one to the other, which took place in the early and obscure years of Henry VII's reign,[2] was doubtless facilitated by the old canonist idea of good faith which easily

1 Cited in 5 Holdsworth, 222.

2 The passage cited in the preceding note is an early step towards the later position.

became transformed into conscience and thence into a formal system of philosophy.

In the fifteenth century the Chancellors made every endeavor to conciliate the common law courts and we frequently find them consulting with common law judges.

"In 1459 it appeared that one J. had bought from J. R. certain debts due to him (J. R.); and that he (J.) had promised under seal to pay the price. But as the debts were choses in action and not transferable, J. had got no *quid pro quo* for his promise to pay. As, however, the promise was under seal, J. was liable on it at common law. He therefore applied to the Chancellor. The Chancellor adjourned the matter into the Exchequer Chamber that it might be discussed by the judges of both benches. They agreed that as J. had got nothing he ought in equity to be released; and J. R. was committed to the Fleet till he cancelled the bond. Nevertheless J. R. not only did not cancel the bond but sued upon it at common law. The Chancellor issued an injunction; and an inconclusive argument took place as to the effect of the proceedings in Chancery and the issue of the injunction. The opinion of Prisot seems to have been that the proceedings in Chancery were not a good defence, and that therefore the injunction should be disregarded. The case shows both that the judges were willing to help the Chancellor to settle questions as to the advisability of equitable interferences with the law, and that they were jealous of any attempt to interfere with the regular course and effect of their own procedure." [1]

The same attitude persisted into the sixteenth century when we find that Sir Thomas More, who had heard complaints against the Chancery, entertained the judges at dinner.

"And after dinner when he had broken with them what complaints he had heard of his injunctions, and moreover showed them both the number and causes of every one of these in order so plainly, that upon full debating of those matters, they were all enforced to confess, that they in like case could have done no otherwise themselves, then offered he this unto them, that if the justices of every court, unto whom the reformation of rigour of the law, by reason of their office, most specially appertained, would upon reasonable considerations, by their own discretions (as they were, as he thought, in conscience bound) mitigate and reform the rigour of the law themselves, there should from thenceforth by him no more injunctions be granted. Whereupon, when they refused to condescend, then said he unto them: 'Forasmuch as yourselves, my lords, drive me to that necessity for awarding our injunctions to relieve the people's injury, you cannot hereafter any more justly blame me.'" [2]

[1] 5 Holdsworth, 220, 221.

[2] Roper, *Life of Sir Thomas More*, cited in 5 Holdsworth, 223, 224.

In this incident the contrast between law and equity is dramatically expressed; when the Chancellor invited the judges to reform the common law by introducing into it the element of discretion and conscience, all the judges could do was to reply with a *non possumus*. More made it clear that in his view the jurisdiction of Chancery was a moral necessity based upon the duty of government to give not merely law but justice to its subjects. Although no doubt a character of More's idealism found this a sufficient justification for equity, the more practical minded could adduce additional reasons from the political situation. The undercurrent of grave discontent which never ceased from the Peasants' Revolt in 1381 down to the Pilgrimage of Grace in 1536 had a good deal of its origin in the inefficiency of legal enforcement and the inadequacy of the law itself, so that although an idealist such as More was ready to make conscience the philosophic basis of equity, it was at the same time, no doubt, possible for the statesmen to regard it from the ancient standpoint of the Crown as the fountain of justice, which was compelled to act in this way in consequence of the stubbornness of the common law courts. In Henry VIII's reign laymen begin to appear as Chancellors and they become the regular rule from Elizabeth's accession. It is more significant that these Chancellors were in many cases not merely laymen but also common lawyers, such as Nicholas Bacon (1558–1579) and Thomas Bromley (1579–1587). It is to this fact that we owe, no doubt, the cordial relations which existed during Elizabeth's reign between common law and equity.

It is in the seventeenth century that we find a conflict forced between them owing to the identification of the Chancery with the other prerogative courts and with a theory of royal absolutism. The falseness of this issue is clearly shown in the fact that even the Commonwealth found it necessary to retain the Court of Chancery and to increase its efficiency by procedure or reforms.

In the fifteenth and early sixteenth centuries we therefore find the development of the rules of equity based upon the procedural or substantive defects of the common law system—its slowness, its expense, its inefficiency, its technicality, its abuse by the mighty, its antiquated methods of proof (for it refused to allow parties or any interested persons to testify), its suspicions of volunteer witnesses and its inability to compel one party to an

action to discover evidence useful to his adversary. Among the defects of the common law which were most frequently supplied in Chancery was its inability at this date to give specific relief in actions on contract and tort, and so we find in Chancery bills to secure specific chattels, to compel a conveyance in accordance with a contract of sale, to obtain the cancellation of deeds, and for injunctions against a variety of wrongful acts, especially waste. The Chancery's powers of examining parties and witnesses and of joining all interested persons enabled it to act efficiently in matters of accounting and the administration of assets. Then the complete refusal of the common law courts to consider cases of uses and trusts left a very wide field to equity. The common law relating to fraud, mistake, accident and forgery was extremely meager while in Chancery alone could relief be obtained against penalties. In the matter of contract the common law in the fifteenth century merely contained the accidental results of a tangle of procedure, but Chancery was inclined to view the matter from a somewhat different angle and developed the additional remedy in certain cases of decreeing specific performance. Chancery jurisdiction, therefore, was based upon the defects of the common law, and even a Chancery lawyer such as Lord Bacon at the end of the sixteenth century, could look upon the popularity of Chancery as a bad sign; the more people resorted to equity, the more obvious it was that law was defective. Many of these defects in the common law were remedied in the course of the sixteenth century, Westminster Hall quite frequently adopting rules which had originated in Chancery. But this improvement in common law was accompanied by a certain degree of degeneration in equity. Chancery procedure became slower, more technical and more expensive, and ceased to be available to the poor. Some of this, no doubt, was due to a defect which equity never cured—the theory that Chancery was a one-man court, which soon came to mean that a single Chancellor was unable to keep up with the business of the court.[1] Not until 1813 do we find the appointment of a Vice-Chancellor.

In the reign of James I, Coke formally declared war upon

[1] From the time of Wolsey in Henry VIII's reign the Master of the Rolls acted as an auxiliary judge, without affording any appreciable relief, however. His powers were much contested until a statute settled them in 1729. His acts were always subject to an appeal to the Chancellor.

Chancery, and this gave the King an opportunity to play a theatrical role and to show his superiority over all his courts by composing their differences. After lengthy argument he reached the foregone conclusion that the jurisdiction of Chancery was valid, and as a matter of fact this royal decree put an end to the attempts of the common lawyers to deny the foundations of equity. Henceforward the question takes the more useful form of ascertaining the proper boundaries between the two jurisdictions. Chancery having vindicated its right to exist by the side of the common law courts, the growth of a disposition for common law and equity to settle their respective spheres produced the natural result that equity should begin to introduce some order into the very miscellaneous mass of rules which it had developed. In the later seventeenth century the Restoration Chancellors were less inclined to exercise the vague and formless equity which had prevailed a century before; the movement in favor of defining the external limits of equity as against the common law naturally inclined equity lawyers to define the content of equity by expressing its principles in clear and precise form. Consequently equity becomes at last a system, although even here the fact that equity began by supplementing the casual deficiencies of the common law left its mark, and for a long time equity looked less like a single system than several systems upon unrelated topics.

The greatest subject of equity jurisdiction is, of course, the trust and its predecessor, the use. Of these we shall speak in detail in discussing real property. As for mortgages, equity had begun to intervene at the very beginning of the seventeenth century, apparently on the ground of relieving against a penalty or preventing usury. Already in 1612 we find the equity of redemption and a tendency to view the transaction as being designed to give security for a debt instead of construing the legal documents strictly according to their tenor. At the same time Chancery was prepared to decree foreclosure in suitable circumstances. By the end of the seventeenth century this new conception of the mortgage had become established, and a long line of cases begins, some defending it against attempts to "clog the equity," and others settling the rights of successive mortgagees — a complication which now became possible under the new view of the mortgage. We already find early seventeenth-century cases

on consolidation and tacking—subjects whose elaboration was the special mission of the eighteenth-century Chancellors. The Restoration Chancellors also developed the family settlement, particularly in the direction of securing the married woman's property to her separate use, and in enforcing separation agreements and separate maintenance. The court also exercised a wide jurisdiction over infants which it based upon the royal prerogative and the duty of the Crown as *"parens patriæ;"* in point of fact, however, Chancery was really carrying on the principles of the common law (which gave wide protection to infants), and the practice of the Court of Wards which had been erected by Henry VIII for the control of feudal wardships.

Equity supervision over matters of account[1] by this time had grown to a considerable mercantile jurisdiction, including bankruptcy, partnership, the chartering and ownership of ships, and the relations between merchants and factors, principals and sureties, although the commercial community was not entirely satisfied, owing to the delays of Chancery procedure which were already beginning to arouse comment. Much of this power was doubtless exercised by the Chancery as successor to the mediæval Council. In the administration of estates Chancery captured a good deal of ecclesiastical jurisdiction, and basing itself upon the rules already laid down by the common law courts it developed a very valuable body of law, which, however, was complicated in form as a result of its dual origin. Specific relief continued to be developed and the equitable treatment of contract was less dominated by the Statute of Frauds than that of the common law courts, the principle of part performance being used effectively.

When we come to the close of the seventeenth century, we see the extension of equitable relief against accident, mistake and fraud to include cases of undue influence—a matter which frequently could not be raised at common law. In the law of evidence equity maintained its advantage in having longer experience of handling oral testimony, which it treated with great freedom. We find some cases, for example, in which parole evidence was admitted to prove that the author of a document

[1] Legal historians interested in this matter will find much interesting material collected by writers on the history of the stage; theatre owners were frequently engaged in litigation, and the literary historians have recently printed a good many Chancery proceedings involving them.

meant something different from what he had expressed, this step being justified on the ground that it was not admitted as evidence to a jury, but only as evidence to the court, "being to inform the conscience of the court who cannot be biased or prejudiced by it."[1] From this period, too, we find the beginnings of one of equity's original contributions to the law of property. In the *Duke of Norfolk's Case* (1681) originates the modern rule against perpetuities; while by using the trust the newer forms of personal property which became prominent after the Restoration, especially stocks and shares, could be brought into settlement. "Equity treated them as property and allowed them to be assigned as property; and it can hardly be doubted that this divergence between law and equity is the reason why it is so difficult to define a chose in action."[2]

It is in this most important period from the Restoration in 1660 down to the beginning of the eighteenth century that equity assumes its new form of a consistent and definite body of rules, and the Chancellors reach the conclusion that equity is no longer a vague and formless discretion; in short, equity is now for practical purposes a body of law which can only be defined as the law which was administered by the Chancellors. The change occurs soon after the Restoration, and we can see it in watching the growth of the principle of precedent in Chancery. In 1670 Chief Justice Vaughan was surprised that precedents should be cited in Chancery, to which Lord Keeper[3] Bridgman replied that "in them we may find the reasons of the equity to guide us; and, besides, the authority of those who made them is much to be regarded. . . . It would be very strange and very ill if we should distrust and set aside what has been the course for a long series of times and ages." And soon afterwards Lord Nottingham declared that the conscience of the Chancellor is not his natural and private conscience but a civil and official one. However, the growth of precedent was slow, for the early equity reports are far

[1] 6 Holdsworth, 662.

[2] 6 Holdsworth, 667.

[3] The Great Seal was sometimes entrusted to a Lord Keeper instead of to a Chancellor; for our purposes the distinction is immaterial, the judicial powers of a Lord Keeper being the same as those of a Chancellor. It was probably the fear of the political power of the Chancellor which led the Crown on many occasions to confer only the less dignified title of Lord Keeper, and sometimes even to appoint only commissioners.

from satisfactory, and it is not until the eighteenth century is well advanced that they become continuous.

By way of conclusion a few words may be said concerning the lives of the most distinguished Chancellors. The earlier Chancellors throughout the middle ages have left us little clue to their personality save those who were also prominent statesmen; the office they held resembled that of Prime Minister, and was certainly not judicial to any great extent. The basis of Chancery jurisdiction was still the maintenance of peace and order, and proceedings in Chancery were therefore approached from an administrative rather than a judicial standpoint. In modern times the Chancellors have frequently had an extremely important influence upon politics, which is a relic of their mediæval position; at the present day in England the Lord Chancellor is a member of the Cabinet and comes in and goes out with the government. Henry VIII's reign contains two notable examples of political Chancellors. Cardinal Wolsey (1515–1529) achieved fame as a statesman, although it is also clear that he was deeply interested in equity jurisdiction, for it was he, perhaps, who accentuated the separation between Chancery, Council and Star Chamber, and insisted that Chancery was a court of conscience. Of his activities as Chancellor we know nothing save by indirect evidence, but the protests of the common lawyers clearly indicate that he was vigorously extending the jurisdiction of his court, and this, together with his overbearing manner, made him enemies among them and increased his political difficulties.

Professor Holdsworth has made the attractive suggestion that the appointment of Sir Thomas More (1529–1532) to succeed Wolsey was dictated by the necessity of conciliating the common lawyers in Parliament, for Sir Thomas More was himself a common lawyer and his father (still living) was a common law judge. We therefore have the unusual spectacle for those days of a common lawyer becoming Chancellor. More's saintly character fitted him admirably for the chancellorship at this moment, for equity was still for practical purposes very largely the conscience of the Chancellor, and Lord Nottingham's distinction which we have just quoted was still a century and a half in the future. As we have seen,[1] More made every endeavor to live at peace with the

[1] Above, p. 240.

common law courts, and the relations he established seem to have lasted for two generations until the days of Coke.

The succeeding Chancellors were men of lesser importance. The next distinguished name is that of Sir Nicholas Bacon who was Lord Keeper for the first twenty-one years (1558–1579) of Queen Elizabeth's reign. At Cambridge he acquired a love of learning, and in later years endowed a school and provided it with scholarships tenable at Cambridge. As a statesman he won the confidence of Queen Elizabeth; as a judge he strengthened the position of his court both against the common law courts and agains the peers, establishing that the latter, like commoners, could be committed for contempt. He reorganized the establishment of the court, which was now large and complicated, and has left us the earliest surviving rules of Chancery procedure.

Of his successors during the same reign the most important was Sir Thomas Egerton, successively Baron Ellesmere and Viscount Brackley, who held the Seal from 1596 to 1617. Egerton was called to the bar in 1572 and enjoyed a large Chancery practice, until Queen Elizabeth (so the story goes) heard him argue in a case against the Crown and was so impressed by his ability that she determined he should never appear again against her, and so made him Solicitor-General in 1581, Master of the Rolls in 1594, and Lord Keeper in 1596; he only became Lord Chancellor in 1603 under James I. His political influence seems to have been considerable, especially with Queen Elizabeth, who had great confidence in him. As with most other prominent people, the accession of James I compelled him to take a side in those controversies which the old Queen had succeeded in repressing, and Ellesmere attached himself to the party of prerogative. In the early years of James I he was obviously trying to treat the new King as a Tudor and to enable him to carry on Elizabeth's policy. In Chancery he issued numerous orders on the procedure and organization of the courts, especially with a view to shortening pleadings and preventing delay. Rather curiously, he discouraged the taking of accounts in Chancery—which was afterwards to become a notable part of equity jurisdiction. He refused to allow the court's process to be abused, and even ordered that pauper plaintiffs who sued without cause should be whipped, since it was useless to condemn them to fines or costs

Contempt of the court's decrees was visited with imprisonment and irons, and when Richard Mylward, an equity pleader, drew a replication in a hundred and twenty pages, when sixteen would have been sufficient, Ellesmere ordered—

> "That the Warden of the Fleet shall take the said Richard Mylward . . . into his custody, and shall bring him unto Westminster Hall . . . , and there and then shall cut a hole in the midst of the same engrossed replication . . . and put the said Richard's head through the same hole and so let the same replication hang about his shoulders with the written side outward; and then the same so hanging shall lead the same Richard barcheaded and barefaced round about Westminster Hall whilst the courts are sitting and shall show him at the bar of every of the three courts within the Hall." [1]

Ellesmere himself, however, was capable of delivering very lengthy opinions; in *Calvin's Case* we are told that "he argued very profoundly and was exceeding long, but read much in his book and had taken infinite pains, for he had wrote a great volume and was almost four hours in his arguments"—which judgment, in fact, constitutes his only published work. Several small tracts have been attributed to him on insufficient evidence, especially certain *Observations on Coke's Reports*. The lack of equity reports at this time makes it difficult to trace his activities save in those cases where emulation with Coke prompted him to preserve his decisions. From such evidence it is clear that the principles expressed in *Doctor and Student* were regarded, at least by Ellesmere, as the foundation of the court's jurisdiction; but already he is careful to declare that equity is law and not merely discretion, and to maintain that Chancery like the other courts had its "usages and customs" to guide its proceedings.

It was during Lord Ellesmere's tenure of the Seal that the independence of Chancery was finally asserted—for such was the outcome of the great struggle between him and Coke. With two such headstrong protagonists the quarrel soon became vigorous. Coke prohibited suitors from going into equity; Ellesmere enjoined them from pursuing common law judgments. The result was a deadlock, and James I appointed a committee which included Sir Francis Bacon, the Attorney-General, to advise him, and after due consideration decreed in favor of the Chancery. Dissension occasionally broke out between Chancery and the

[1] Monro, *Acta Cancellari*, cited in 5 Holdsworth, 233.

common law courts at various later moments during the seventeenth century, but the position of Chancery could not be seriously assailed after Ellesmere's victory.

Ellesmere was succeeded in 1617 by Sir Francis Bacon, Lord Verulam, Viscount St. Albans, commonly called Lord Bacon.[1] It is hardly possible for any one person to form an adequate estimate of Bacon's achievements, so great and so varied were they. As a man of letters, historian, statesman, lawyer, philosopher, he has many separate titles to fame. In politics in his early days under Queen Elizabeth he had held liberal opinions and had even suggested that the royal prerogative was subject to the control of law, but in her closing years he drew nearer to the court, and by the accession of James I he was recognized as a royalist. His political progress was thus exactly the reverse of Coke's. Such indeed seemed the only way to office and influence, and it may well be that Bacon had other reasons for desiring office than merely the advancement of his personal fortunes, for he had in mind vast schemes of legal and political reform,—the union with Scotland, the civilization of Ireland, the colonization of America, the abolition of feudalism, and far-reaching measures for the improvement of the law,—and at that time the only possible means of carrying them out was through the active participation of the Crown. Like many others during the early days of James I, he thought that the Tudor idea of government by Crown and Council, with Parliament registering their decisions, was still practical politics, but even Elizabeth was finding this difficult in her later years, and for James it was obviously impossible. Bacon therefore found himself attached to a cause which was hardly worthy of him, and which in the end gave no help in the furtherance of his schemes.

His early career began at Trinity College, Cambridge, Gray's Inn, and the British Embassy at Paris. In 1584 he entered Parliament and soon learned that in opposing the Queen he would be blocking his prospects. His letters are full of attempts to obtain office, which in those days could hardly be done without a good deal of court influence. Bacon at first was not very successful, and it was only in 1607 that he became Solicitor-General,

[1] He is the son of the Lord Keeper Sir Nicholas Bacon, mentioned above, p. 247.

and in 1613 Attorney-General, which gave him a leading part in the victory which Ellesmere had just won for the Chancery. In 1617 he succeeded Ellesmere as Lord Keeper and in 1618 he received the title of Chancellor and a peerage. His life at court seems to have been something unnatural to a man of his temperament. He was clear-sighted enough to realize that the influence required to carry out his schemes could only be obtained by engaging himself in the welter of intrigue which surrounded James I, and so we find this matchless philosopher writing careful notes in order to train himself in the miserable business of a seventeenth-century courtier. In the midst of all this he found time to lay the foundations of modern scientific thought in a work which the learned James I likened to the peace of God because it passed all understanding (that is to say his own), and which Coke inscribed with a satirical couplet.

Lord Bacon naturally followed the extravagant mode of life fashionable among courtiers and could hardly help himself from adopting the courtier's morality. He allowed the Court of Chancery to sink to the level of the circle which surrounded James I, and seems to have permitted the Earl of Buckingham to exercise undue influence in the conduct of its proceedings, if not in the formation of its decisions. In the end, the common lawyers were able to bring and to sustain grave charges against the corruption of Chancery, and when one of the officials of the court was found guilty of forging court orders and dismissed, he took his revenge by accusing the Chancellor himself of corruption. He was impeached on twenty-eight charges and pleaded guilty.[1] The facts alleged against him he admitted, but maintained that the presents and influence brought to bear upon him had never once perverted his judgment. He was removed in 1621, and died in 1626. The tragedy of Bacon's life was that he first sought power for the noble end of carrying out his reforms, but in the endeavor to obtain that power his ideal became clouded and he employed every means, however unworthy of the object he had in view. Worst of all,—and this is a point which a clearer-sighted politician might have seen,—however much power he attained in the court of James I, there was little probability of

[1] A later Chancellor, Lord Macclesfield, was impeached under somewhat similar circumstances.

his being able to use it for the great purposes he had in mind. The foundation of the courtier's art is a sound judgment of human character, and Lord Bacon suffered two deceptions. He may perhaps have had no illusions as to the court favorites whose support he sought, but he misjudged Sir Edward Coke, underestimated the strength of the common lawyer's position, and failed to realize that Coke's bitter enmity was sufficient to frustrate his designs. Then, too, he misjudged James I. When most men soon discovered that James did not possess the greatness of the Tudor monarchs, Bacon still continued to hope that the King's influence could be used to further his ideals.

Although Lord Bacon's public life can hardly be regarded as anything but a failure, the other aspects of his work entitle him to the highest fame. Of his labors in literature and philosophy we cannot speak here, but his work as a jurist deserves careful attention. As a common lawyer he achieved great distinction, which was only the more remarkable for its contrast with his great rival, Sir Edward Coke. Contemporaries are unanimous in praising his eloquence, the masterly manner in which he grasped legal principles, and the clearness with which he presented his arguments. This broad view on legal questions he himself attributed to the results of studying Roman law, which also enabled him to estimate the value of the common law with more accuracy than Coke. His observations upon the defects of the common law are very penetrating. Among the remedies which he suggested were two digests, one of case law and one of statute law, to be followed by works of an institutional character—it is clear that he is thinking of the sort of reforms which Justinian carried out in Roman law.

Very little is known of Bacon's decrees as Chancellor. He seems to have imitated the practice of Sir Thomas More in trying to establish better personal relations with the common law judges, and he did his part in establishing good will by making orders to prevent the abuse of injunctions. In all this he seems to have been successful. The policy which he outlined when he took his seat in Chancery shows that he intended to keep as far as possible important matters in his own hands; he disapproved of the growing weight given to the reports of the Masters in Chancery, and of the freedom with which orders were made on *ex parte* applications. The hundred and one orders which he issued in 1619 were

the basis of Chancery practice until the nineteenth century, and constitute the one piece of codification which he was able to carry out. And finally, he had that rare merit in a Chancellor of keeping level with his work.

"It may be fairly said, therefore, that Bacon left his mark upon the Court of Chancery. As attorney-general he had been largely instrumental in vindicating the independence of the court, and in thus securing the free development of equity. As Chancellor he helped to restore harmony between the Chancery and the courts of common law; and he created from the scattered orders of his predecessors a code of procedure, the formation of which was a condition precedent to the development of a system of equity. Thus he consolidated and completed the work of that school of lawyer Chancellors which had come with the chancellorship of Sir Thomas More. That the development of a system of equity did not make rapid way till after the Restoration was due wholly to political causes." [1]

Of the Chancellors who succeeded Bacon it is not easy to speak in the absence of adequate reports of their decrees; some of them achieved fame in other fields than that of the law, Lord Clarendon for example. Equity suffered an eclipse during the Commonwealth but it quickly recovered at the Restoration. The Chancellors of Charles II after Lord Clarendon (1658–1667) were, first, Sir Orlando Bridgman (Lord Keeper 1667–1672), an eminent conveyancer who is credited with having contributed to the invention of trustees to preserve contingent remainders[2] and the rule against perpetuities.[3] Bridgman's judicial work in equity was undistinguished. He was succeeded for a year by the Earl of Shaftesbury, a courtier and a wit who was prominent in the Cabal ministry, and he in turn was succeeded by Sir Heneage Finch (1673–1682) who later became Lord Finch and Earl of Nottingham. The Finch family had already achieved legal eminence and the future Lord Nottingham, after his call to the bar by the Inner Temple in 1645, rapidly acquired a good practice under the Commonwealth. At the Restoration in 1660 he became Solicitor-General, in 1670 Attorney-General, Lord Keeper in 1673 and Chancellor in 1675, holding the Seal until his death in 1682. In politics he was a strong but not an extreme royalist.

[1] 5 Holdsworth, 254.

[2] 7 Holdsworth, 112.

[3] The settlement involved in the *Duke of Norfolk's Case* was drawn by Sir Orlando Bridgman; 7 Holdsworth, 222 nn. 2 and 5.

To immense legal learning he added a broad general culture which served as the basis for his policy of conservative reform; as Solicitor General he introduced the bill abolishing military tenure, and as Chancellor he drafted the Statute of Frauds.[1] In spite of his mastery of legal technicalities, he would deliberately place himself in the position of a layman in order to test the reasonableness and fairness of the decisions he was to make in the name of equity; indeed, his attitude both in law and in politics was substantially the same, namely, a determination to keep State policy and legal practice in harmony with contemporary thought and conditions.

Among his decisions are some notable contributions to international law, but his greatest title to fame is his work in the development of equity. It is easier to follow his decisions than those of his predecessors, for quite a number of them have been published, but it is understood that a good many are still in manuscript. His greatest decision was in the *Duke of Norfolk's Case* (1682–1685)[2] on the rule against perpetuities. Out of an almost hopeless mass of confused decisions, Nottingham derived the clear and reasonable rule that a limitation which is bound to take effect, if at all, within a life in being, could not be called with any reason a perpetuity. "Pray let us so resolve cases here," he exclaimed, "that they may stand with the reason of mankind when they are debated abroad. Shall that be reason here which is not reason in any part of the world besides?" To the objection of some that the limitation would certainly have been good if it had been expressed through a more artificial arrangement, he replied, "that is such a chicanery of law as will be laughed at all over the Christian world." This decision, by concentrating attention upon the really crucial factor in perpetuities, namely, the date at which the limitation takes effect rather than the details of the form in which it is drawn, enabled the present rule to take shape within the next fifty years. In *Cook* v. *Fountain*[3] he undertook a logical classification of trusts; in *Thornborough* v. *Baker*[4] he decided that the executor and not the heir of a mortgagee is entitled to the debt secured by the mortgage, and of this

1 Above, pp. 56–57.
2 2 Swanst. 454.
3 3 Swanst. 585 (1672).
4 3 Swanst. 629 (1675).

rule he said: "This has long been a controverted point and was never fully settled until my time. . . . Therefore it is not fit to look too far backwards or to give occasion for multiplying suits." He was well aware of the fact that he was establishing new principles and abrogating old ones which would make the former precedents useless. We have already mentioned his dictum that a Chancellor's conscience is politic and civil rather than internal and natural, and that therefore equity was a matter of rule and not of discretion; as he once said, "it is infinitely better for the public that a trust security or agreement which is wholly secret should miscarry than that men should lose their estates by the mere fancy and imagination of a Chancellor." Already during the seventeenth century several Chancellors had reached the Woolsack by way of the bench, and so naturally brought with them some of the ideas of the common law, and it was this influence which Lord Nottingham strengthened in making the first serious attempt to fix the doctrines of equity—a process which was not completed until the close of the next century.

"He deserves a place by the side of such Chancellors as Ellesmere and Bacon. His work was different from, and yet a continuation of, theirs. They had organized and systematized the court of Chancery, its practice, and its procedure. He began the work of organizing and systematizing the principles upon which the court acted; and, as a result of his work, equity began to assume its final form. His success was due partly to his own industry and genius, partly to the fact that the time was ripe for the beginning of such a settlement. The man and the opportunity happily coincided; and so, whether we look at his influence upon the principles of equity, or upon the character of equity itself, we must admit that he deserves his traditional title of the Father of Modern Equity." [1]

Of the successors of Lord Nottingham mention must be made of Francis North, Lord Guilford (1682–1655), during the reign of Charles II, and of Lord Somers (1693–1700), the first Chancellor after the Revolution.[2] Somers has left the reputation of a very great lawyer; his political career is best known, however, and many of his decisions are upon the important points of constitutional law arising out of the Revolution. The most important

[1] 6 Holdsworth, 547, 548.

[2] From 1689 to 1693 the Great Seal was in commission.

case he decided was the *Bankers' Case* (1695–1696)[1], which he treated from a sound historical point of view, his attitude being in striking contrast to the more practical judgment of Lord Holt. Nevertheless to both of these two judges we are indebted for the decision that a petition of right can be used to obtain damages for breach of contract against the Crown.

The reigns of Queen Anne (1702–1714) and George I (1714–1727) saw several Chancellors whose names are still held in respect for their work in the formation of equity; we may mention Lord Cowper (1705–1708, 1714–1718), Lord Harcourt (1708–1714), and the Earl of Macclesfield (1718–1725), while under George II there were Lord King (1725–1733) and the short term of Lord Talbot (1733). The greatest legal figure in the reign, however, was Sir Philip Yorke, first Earl of Hardwicke. He was born in 1690 and left school for an attorney's office. He then entered the Middle Temple and was called in 1715, entering Parliament in 1719 as a *protégé* of Lord Macclesfield. His political career was that of a Whig supporting the Revolution settlement and the House of Hanover. In 1720 he was Solicitor-General, and in 1724 Attorney-General, where his first official case was to have been the impeachment of his old friend and patron, Lord Macclesfield—a duty which he was allowed to delegate to the Solicitor-General. He was a consistent supporter in the House of Sir Robert Walpole. In 1733 he succeeded Lord Raymond as Lord Chief Justice of the King's Bench, and in 1737 he succeeded Lord Talbot on the Woolsack, becoming one of the most influential members of the government and interesting himself greatly in foreign politics. In 1751 he supported the reform of the calendar, and in 1753 he secured the enactment of the Marriage Act, usually called Lord Hardwicke's Act. Contemporaries gave him the reputation of being a conservative and of being conspicuous even in those days for securing rich sinecures for his numerous children; as one of his enemies said, "Touch but a cobweb of Westminster Hall, and the old spider of the law is out upon you with all his younger vermin at his heels." In truth his temperament seems to be fitted rather for gradual judicial reform by way of decision than for the speedier methods of the legislature. As Attorney-General in 1727 he successfully

[1] 14 S. T. 1.

argued in *Curl's Case*[1] that an obscene libel was a misdemeanor at common law, and that the exclusive power of punishing it was not in the ecclesiastical courts. His decisions as Lord Chief Justice present no special interest save perhaps one in 1737 which involved a clandestine marriage; this case, it seems, directed his attention to the unsatisfactory state of the law of marriage and prompted him to reform it in later years by statute. As Chancellor he had the great advantage of twenty years' uninterrupted tenure which enabled him to carry out a systematic policy.

"His restatement of the basic principles of equity, harmonizing the precedents with the philosophic notions of his age, almost completed the system. After his day it was possible to advise with some confidence on the probable result of a Chancery suit. He was accustomed to ascertain what questions arose in the cases before him, and then to examine whether the principles to be drawn from the precedents afforded a solution. Often the precedents consisted merely of the record of the proceedings, with no clue as to the reasons which had led to the decree. Sometimes a report was available, and then the reasoning could be followed, though too often in those days the report was inaccurate. Where no guidance could be had from precedent, there was always the Roman law and the modern systems based on that law. The reports diligently gathered these decisions and made them accessible to practitioners. Not all Hardwicke's judgments have survived subsequent judicial examination, but it is a noteworthy fact that even now the last edition of White and Tudor's *Leading Cases in Equity* still retains ten of Lord Hardwicke's decisions to illustrate the leading principles of equity. Apart from these ten, hundreds of his judgments have become embodied in the very structure of equity and are followed every day in confident reliance upon their inherent justice." [2]

Among his decisions was one which allowed a husband to have curtesy in an equity of redemption; in another he held that the compromise of a doubtful right is good consideration for an agreement—the case had turned upon a family's effort to conceal the fact that one of its members was illegitimate, and Lord Hardwicke here and on other occasions held that equity was particularly interested in the protection of family honor, which indeed was a logical deduction from a century and a half of history during which equity had busied itself with composing family difficulties. In 1747 he found a way around a recording statute which at first sight looks very much like frustrating it in the name of equity.

[1] 2 Stra. 788.

[2] Birkenhead, *Fourteen English Judges*, 158.

In 1750 we have the great case of *Penn* v. *Baltimore*[1] involving the boundaries of Pennsylvania and Maryland; as the defendant at the moment happened to be in England, Lord Hardwicke held that the Court of Chancery had jurisdiction by acting *in personam* to compel him to do equity.

Of Hardwicke's successors there were many who achieved distinction, but we must now pass to the chancellorships of John Scott, Lord Eldon (1801–1806, 1807–1827), nearly fifty years later. He was the son of a prosperous tradesman of Newcastle. He was educated at Oxford and persuaded his younger brother (who afterwards was to become Lord Stowell) to take the same course. His plans were temporarily interrupted by his elopement with a banker's daughter, which at first brought him into difficulty, although upon regularizing the marriage the banker made a settlement upon the couple. For a small salary he undertook to read the lectures prepared by the Vinerian Professor at Oxford, and to his confusion discovered that the first lecture was upon the law to punish men who elope with heiresses. In the meantime he studied law and devoted himself to an equity practice. In 1780 his opportunity came. He was given a brief to consent to an order, but perceived that his client had a case which was worth arguing. He argued it and won, and the decision was upheld on appeal by the House of Lords. There is a story that shortly afterwards he was engaged in a case where he was to argue against the principle which he had thus established, to which the judge said, "Mr. Scott, I have read your argument in *Ackroyd* v. *Smithson* and I defy you or any other man to answer it. Sit down, I beg you." He immediately obtained a large and important practice, and three years later he took silk and entered Parliament. At first unsuccessful, he gradually made his way in politics and in 1788 he became Solicitor-General and had to deal with the constitutional difficulties caused by the King's malady. In 1793 the outbreak of the French Revolution caused him to promote a stringent series of statutes for the prevention of sedition, and to conduct numerous prosecutions based upon them. In 1799 he became Lord Chief Justice of the Court of Common Pleas and was raised to the peerage as Baron Eldon. Two years later he succeeded Lord Loughborough as Chancellor. Among other

[1] 1 Ves. Sen. 444 (1750).

troubles he had the delicate duty of composing the difficulties in the royal family, attaching himself to Caroline, Princess of Wales. In 1806 he was succeeded by Lord Erskine, but was restored in 1807 and continued to sit for another twenty years. He was now a conservative of the most uncompromising type, and during those twenty critical years the whole of his immense influence was employed in frustrating every possible reform. The same policy was pursued simultaneously by the Chief Justice of the King's Bench, Lord Ellenborough. Only on one or two occasions did he lend his name to reforming legislation, such as the abolition by statute in 1819 of trial by battle which had been obsolete for many hundreds of years,—an obvious reform which most curiously was opposed by the radicals, who believed that the liberty of the subject was being thereby attacked,—while in 1815 trial by jury in civil cases was introduced into Scotland. In 1819 Lord Eldon actively promoted the drastic series of six acts which were calculated to repress political discussion after the Peterloo incident.

In 1820 George IV came to the throne. Lord Eldon received an earldom and abandoned his support of Caroline whom the King refused to recognize as Queen, and had to undertake the proceedings attendant upon a bill for her divorce. Political changes had brought the liberal Canning into the ministry, and when he finally became Prime Minister in 1827 Lord Eldon resigned. Although he was now seventy-six he gathered his strength for his last great fight, and lived to see the enactment of all the measures which he feared most. In 1828 the religious disabilities of Protestant non-conformists were removed; in 1829 the Catholic Emancipation Act was passed, and in 1832 the Great Reform Act laid the foundation of modern democracy.

His work as Chancellor had great merits and great defects. His mind was particularly fitted for drawing fine distinctions and discussing subtleties and niceties, while his scrupulous character would not permit him to decide a case until he had exhausted all its possibilities and examined it from every angle. As a result his decrees, although excellent, became increasingly slow, and the accumulation of business was steadily reducing Chancery to the position which Dickens has described in "Bleak House."[1]

[1] See Professor Holdsworth's learned and entertaining study *Dickens as a Legal Historian* (Yale University Press).

His legal work was to complete the process whereby equity hardened into law, and for work of this type he was admirably fitted. It was his success in this direction which enabled the Judicature Act within fifty years of his death to amalgamate law and equity, and to authorize the administration of both systems by the same court. Of the vast number of his decisions, many are leading cases of present as well as historical importance, and will be encountered by the student in his studies.

PART IV

THE METHODS OF PROGRESS

In this part we shall briefly describe the various elements which have contributed to the growth of the law. The conditions of society and men's attitude towards them are slowly but constantly changing, and the law must do its best to keep in harmony with contemporary life and thought. The law, too, must therefore change, and one of the most instructive aspects of legal history is the study of the various elements which have been used in bringing about the necessary revision of the legal fabric. *Custom* in its greatest days was flexible, and the growth of custom was a potent factor in effecting legal change. With a centralized system, however, other and more exact machinery must be devised; hence the establishment of new *forms of action* which will permit officially minded courts to perform newer duties, while *legislation* will promote uniformity throughout the common law jurisdiction. But still slower and more subtle changes can yet be produced through the courts themselves developing a sort of custom by taking tentative steps and later crystallizing them into rules of law based upon *precedent*.

These four factors we shall now consider in turn.

CHAPTER I

THE FLEXIBILITY OF CUSTOM

The modern age of legislation by means of laws deliberately set up and expressed in certain definite documents covers but a very small period of legal history. Preceding it the principal element in most legal systems was custom. There were, of course, other factors as well in many cases. In canon law, for example, there were authoritative texts from the Bible and elsewhere, and most systems had at least a few examples to show of deliberate legislation. But the great mass of the law into which these exceptional elements had to be fitted was custom. Our earliest Anglo-Saxon laws are modifications of detail and obviously assume that the legal fabric is essentially customary. The communal courts which survived into historical times, especially the hundred and the county, were customary in their origin and declared customary law whose sanction was derived from custom. But the remarkable feature of custom was its flexibility and adaptability. In modern times we hear a lot too much of the phrase "immemorial custom." In so far as this phrase implies that custom is or ought to be immemorially old, it is historically inaccurate. In an age when custom was an active living factor in the development of society there was much less insistence upon actual or fictitious antiquity. The middle ages seem to show us bodies of custom of every description developing and adapting themselves to constantly changing conditions. We can see the first beginnings of a custom and trace its rise and modification; we can even see it deliberately imported from one place to another; it is a common sight to see a group of townspeople examine the customs of more advanced communities, choose the one they like best, and adopt it *en bloc* as their own. Indeed nothing is more evident than that custom in the middle ages could be made and changed, bought and sold, developing rapidly because it proceeded from the people, expressed their legal thought, and regulated their civil, commercial and family life. The custom of a mediæval community may well have been much

more intimately a product of the work and thought of those who lived by it, than is a modern statute enacted by a legislature whose contact with the public at large is only occasional.

With the progress of history, therefore, we see the constant growth of new custom, which is the natural method of making provision for new communities and the more modern needs of old ones. Just as the communal courts declared the custom of those who were subject to them, so we find that the newer feudal courts develop and declare the custom which governs the feudal relationship. Feudalism was a re-arrangement of society upon a military rather than a capitalistic basis, designed to meet a grave emergency created by external invasion and the fall of the central authority. This re-arrangement was effected and maintained by the development of new bodies of custom governing novel situations. In short, feudalism is a very striking example of the radical changes in society which can be effected by the rapid modification of custom. This flexibility of custom enabled society in the tenth and eleventh centuries to re-organize itself with much greater ease and responsiveness to changing conditions, than if all this had to be done by drafting and adopting explicit legislation. Later still, the decline of feudalism was likewise effected by changes in custom; the growth of heritability in feudal fiefs, the strict limitation of feudal services, the development of the supremacy of the Crown, were all in effect the recognition by shifting custom that the spirit had departed from feudalism.

With the decline of feudalism came the growth of the royal authority, and this at first took the form of customary modifications in the relationship between the Crown and its vassals. By this time society was developing so rapidly that changes in custom had to be made with unusual precision; conflicts of interests sometimes resulted in rebellion or civil war, which in turn produced drastic changes in custom by a new method—legislation. Typical of such incidents are the events leading to *Magna Carta*, and from that date onwards it becomes steadily more clear that the growing supremacy of the Crown will bring with it national legislation, and that this national legislation will be in the end compelled to destroy custom in self-defense. Such in the broadest outline is the history and ultimate fate of custom.

During the middle ages, however, the conflict was still undecided; until the rise of the modern state and modern ideas of

sovereignty custom still had a large if diminishing place in our legal history. Feudal custom includes the relationship of Crown and nobles until the moment when this body of custom separates and becomes first the law of the prerogative and then later still combines with the custom of the King's High Court of Parliament to form modern constitutional law. The King's other courts rapidly produced a body of custom—the contrast between Glanvill's tiny treatise and Bracton's heavy folio shows how much custom could be developed in two generations—which is the basis of the common law. Very soon there is a substantial quantity of legislation, but nevertheless that legislation always assumes that it will be construed in the light of the whole body of customary law. In striking witness to this we have the curious phenomenon of some statutes gradually being assimilated into the common law; *Magna Carta* very soon became in theory as well as in practice part of the common law, and so did other statutes.[1] Indeed, when English common law was being adopted in America there was sometimes a question as to how far certain statutes were to be regarded as inseparable from the customary common law.

Exactly parallel to the growth of national unity in England was the development of the primacy of the papacy. The same problems were involved; a large number of scattered communities had developed masses of ecclesiastical custom, and if Christianity was to maintain itself against the disruptive forces of feudalism the papal monarchy was a political necessity. That monarchy itself grew up largely through the operation of custom, and when its dominance was practically assured its position was defined in dogmatic form. Then came the problem of the relationship between the Holy See and numerous bodies of local ecclesiastical custom which still survived, and which under newer conditions hampered the work of the papacy. To this situation many canonists devoted careful thought and the result of their speculations was to provide a philosophical basis in justification of papal policy.[2] It was the canonists who (building on the foundation of Roman law) devised a rational basis for a general attack upon custom. Long before England had become a State in the modern sense of the word, the canonists were laying down what was in

[1] Plucknett, *Statutes and Their Interpretation*, 134.

[2] See in general, Lambert, *La Fonction du Droit Civil Comparé*, i. 103 208; Wehrlé, *De la Coutume dans le Droit Canonique*.

effect the modern doctrine, and from them the common lawyers were to learn some very useful rules whereby custom could be subjected to the national sovereign.

The attack upon custom which had already begun in England before the close of the middle ages did not proceed with equal force; some types of custom for a long time were hardly affected, and so we shall briefly describe the more notable varieties of custom in English mediæval law. Beginning at the bottom we have that complicated economic unit, the manor, whose rural economy and social structure are almost entirely a matter of custom. Within the manor there proceeded a dramatic struggle between various groups of custom which has had the profoundest effects upon society. It is clear that the condition of the tenants of a manor is in fact the condition of the bulk of the population, and the changing social and legal condition of the peasant is an important part of the history of the modern working class. Originally free, or nearly so, the growth of feudal custom depressed the inhabitants of the manor to the position of serfs, and this change took place partly in the manorial courts developing and declaring local custom, and partly in the royal courts developing and declaring customary common law. The rapid rise to supremacy of the Court of Common Pleas had the practical effect that property in land was ultimately whatever the Court of Common Pleas should adjudge. Now, after a moment of hesitation, the Court of Common Pleas decided that it could not be bothered with the affairs of peasants. To say that the peasant's property rights could not be defended in the Court of Common Pleas was almost immediately recognized as equivalent to saying that he had no property rights at all. This was the accepted theory from the beginning of the fourteenth century onwards; Westminster Hall expressed it in the form of the dogma that the freehold in a villein's lands was in the Lord.

Then came the Black Death, and with it the economic revolution of the middle of the fourteenth century. This crisis emphasized tendencies which had already appeared even before the plague—tendencies which took the characteristic form of the growth of new custom. There grew up in the manors of tolerant lords the custom of allowing villeins to succeed by hereditary right to their ancestors' holdings. They were permitted to buy and sell servile land; in some cases the lord's manorial court would enter-

tain litigation between villeins, using all the forms of Westminster Hall with their technical allegations of "fee and right which ought to descend" and so on. The only difference was that the villeins' claims always concluded with the words "according to the custom of the manor." By this means the villeins of many manors acquired all the benefits of common law ownership through the machinery of the custom of the manor. Many landlords, however, were shrewd enough to detect this tendency, and to take steps to prevent the growth of a custom. The courts of common law refused to recognize such revolutionary custom; according to their reasoning the freehold was in the lord, and they refused to admit that the custom of the manor could have any effect upon the lord's position in the Court of Common Pleas. Indeed, if this custom had been immediately recognized the effect would have been most startling, but in point of fact recognition came so late that public opinion was already thoroughly familiar with its implications. In this great work Coke played a prominent and honorable part,[1] and a line of his decisions at the close of the sixteenth century finally established the principle that the customary interests of a villein in his lands under the custom of the manor could be recognized and defended in the Court of Common Pleas.

"The fate of the erstwhile villein is, therefore, linked with some of the momentous movements in our legal history, and this is not the place to pursue the discussion further. A thorough history of copyhold would occupy a very important position in the social and legal history of England. Here we shall make but one more observation, and that will be to remark upon the strange ebb and flow of property rights which the history of copyhold reveals. In the early days of Henry III, when Pateshull and Raleigh were judges, the villein was almost protected, even in the royal courts. Perhaps it would be more accurate to say, as Maitland has suggested, that he had hardly yet been entirely excluded from royal justice. But in any case the evil day was not far off, and soon the dogma takes shape which will deprive the villein of his property. Within two centuries the tide begins to turn. Custom will be recognized by the courts of equity and they will begin the sober task of 'receiving rather than reforming' manorial custom. Lords of manors, who for two centuries have been assured by the common lawyers that they own the freehold in their tenants' copyhold and customary lands ('freehold' being now a word of great power), are informed that they are only 'instruments of the custom.' Finally, even the common law courts will be drawn into the stream and allow the copyholder to bring ejectment as if he were a freeholder.

[1] He wrote an admirably lucid little book on copyhold (as such customary tenure was later called).

In all this, moreover, a great part will be played by the illustrious Coke, who in other respects proved such a champion of conservative and propertied interests against innovation. And thus the heirs and successors in title of the fourteenth century villein are once again restored to their property rights. There are surely few movements in legal history so curious as this silent shifting of property back and forth. One need only glance at the corresponding processes in France and Russia to realize the gravity of this social revolution, which in England was effected without an insurrection, without legislation, and almost without deliberate thought." [1]

By this time the Court of Common Pleas had grown a little bit afraid of this powerful force of custom. It became necessary to impose limits and to do something to check social changes carried out solely through custom. They were content to allow at least some of the villeins to achieve property rights under the new name of copyholders, but in order to prevent a too rapid transference of property rights from lords to copyholders, they confined the operation of the new doctrine to those cases where the custom was, or seemed to be, immemorially old. This was a new weapon and an effective one whenever the law courts wished to limit the operation of a custom; it was easy to say that the antiquity of a custom would have to be proved right back to the time of legal memory (3rd September, 1189, the date of limitation of the writ of right). Such a distinction was completely false; nothing is more certain than that there was no copyhold anywhere in the year 1191: but the doctrine served as a means of checking any further rapid growth of customary tenures, and in its practical effect it retarded without completely stopping the movement. When we get to this doctrine of immemorially old custom it is obvious that we are in modern and not mediæval times. The whole idea is as artificial as the date of limitation which it set, and it is clear that in the sixteenth century, when this doctrine first appears, custom had largely ceased to be a familiar notion to the common lawyers, who regarded it henceforth as a troublesome and perhaps a dangerous anomaly which must be confined as strictly as possible within harmless limits. This idea is no better exemplified than in the famous *Case of Tanistry*[2] when the common law tests of custom were used to break up the social organization of the Irish nobility, the case becoming a leading authority upon the law of custom.

1 Plucknett, *Year Book 13 Richard II*, introduction, pp. xlii, xliii.
2 *Case of Tanistry* (1608) Dav. 28.

An almost equally remarkable product of customary law occurred upon the continent among the lesser free landowners down to the early thirteenth century. As the result of the coincidence of a number of different customs and practices, there developed the famous custom of community property between husband and wife, a system which obtains in most continental countries and in some parts of America.[1]

Then, too, in England there were numerous customs of cities and towns which throw an extraordinary light upon law and society in the middle ages. The common law was the custom of the King's Court, and an outgrowth of feudal conditions which applied particularly to the larger landowners; for the upper classes of society its rules were no doubt appropriate, but it is only in the local custom of numerous cities, towns and villages that we can see how different the life of the ordinary people was. In these customs, for example, we find that the position of the married woman was very different from that which the common law assigned her, the complete merging of personality being obviously out of harmony with bourgeois habits. Local customs frequently keep the woman's property free from her husband's control, accord her liberty of contract (which was denied at common law), and even allow her to trade separately upon her own account. The extent of these local customs is hardly known. Many custumals have survived,[2] but many others have not. Indeed, it was typical of customary law that there was no need for it to be written down, and there can be no doubt that many communities had notable bodies of custom without ever possessing a written custumal. By the merest chance an example of this recently came to light. In defence to an action of account in 1389, it was pleaded that by the custom of the little village of Selby in Yorkshire a husband was not liable for the commitments of his wife incurred in the course of her separate trading.[3] There is no extant custumal of Selby, and apart from this case no other indication is known of Selby possessing a body of customary law. Only the accident which raised the point in the Court of Com-

[1] This is the most recent suggestion made by Lemaire, *Les Origines de la Communauté de Biens Entre Époux*, Revue Historique de Droit, 1928, 584–645.

[2] For the boroughs, their provisions have been arranged according to subject matter in one *corpus* by Miss Bateson, *Borough Customs* (2 vols. Selden Soc.). Borough charters have been similarly treated by Ballard and Tait.

[3] Plucknett, *Year Book 13 Richard II*, Introduction, xlvi.

mon Pleas has enabled us to learn this important fact, which is a strong warning to bear constantly in mind that the common law, even so late as 1389, did not extend to all persons and places, and that there was an incalculably large mass of customary law involving very different principles in numerous different communities of which we only know a fraction.

Of these local customs, those which were developed in particular places where fairs and large mercantile interests existed naturally acquired strong mercantile characteristics. In this way we come to the growth of a body of mercantile law which was commonly called the law merchant. It seems to have grown out of strictly local custom, and all through its history local variations are conspicuous. Inevitably, however, there grew up forces which made for greater uniformity, and in the end, as we have seen, what used to be the custom of numerous towns and fairs became the unified custom of a particular class, that of the merchants.[1]

On examining the vast mass of customary law of which we still have surviving evidence, we get the impression of great activity in countless small communities, which are constantly endeavoring to regulate their life by developing approved courses of conduct which can be imposed and enforced upon the recalcitrant in the name of custom. The great variety of customary provisions, and the eagerness with which new communities compared different bodies of custom in order to choose the one best suited to their needs, seem to show that we must not neglect custom if we would find initiative, experiment and new thought in mediæval law. An examination of our earlier statutes will show that many of them adopt into the common law principles which had been developed already in some one or another custumal, and this confirms the impression that the common lawyers themselves in the formative period of their profession were glad to look to local custom and to choose from it those principles and devices which, having been tried, had been found satisfactory, and to extend them to the nation at large by enacting them as statute law.[2]

1 Above, pp. 222–233.

2 See the recent suggestive article by Schechter, *Popular Law and Common Law*, 28 Columbia Law Review, 269–299.

CHAPTER II

THE FORMS OF ACTION

The forms of action are in themselves a proof that the King's Court only intended to intervene occasionally in the disputes of his subjects. It was no doubt possible to argue with perfect justice that the country was well provided with competent courts for all ordinary purposes, and that the King's Court was only concerned with matters of state and matters of special difficulty which could not be otherwise determined. A few classes of cases with which the King's Court concerned itself were therefore most naturally treated along formulary lines. They constituted one or two of the several routines of government which the administration had developed, and in order to handle them more easily it was a simple device to standardize the forms which were used. As long as this condition of things lasted a formulary procedure was clearly an advantage, and for a while it may have limited the activities of the administration and prevented them from overstepping the proper boundaries of their jurisdiction. When from time to time it became necessary to enlarge the scope of the King's Court, the change could be effected simply by the invention of a new set of forms, and so the early development of the jurisdiction of the King's Court very closely resembles the enlargement of the sphere of an administrative body by means of the invention of new administrative routines. Once the habit was formed, future development for a long time seemed simple. Glanvill had described a royal court which had very little interest in enlarging its jurisdiction beyond certain matters. Two generations later Bracton described this same court and shows us how greatly it had elaborated its machinery; indeed, Bracton was even ready to contemplate an indefinite expansion of the common law in virtue of which the King's Court was to administer a law as rich in its variety and as wide in its extent as the Roman law itself. The means whereby such a prodigious expansion was to be effected (and indeed had already been begun) was the invention of new forms of action; many new forms were invented by Bracton's

hero Raleigh, and Bracton had no hesitation in saying that there will be as many forms of action as there are causes of action. "There ought to be a remedy for every wrong; if some new wrong be perpetrated then a new writ may be invented to meet it."[1] This was a bold program. It contemplated special sets of forms through which the King's Court would exercise general jurisdiction and afford a remedy for every wrong. One would expect that so ambitious a scheme would emanate from some great monarch such as Henry II, and in truth he may have taken the first steps in that direction; but it was under the comparatively weak rule of Henry III that the greatest progress was made—and here we have a striking example of the way in which organizations such as the King's Court and Council could do effective and even constructive work although their nominal head was undistinguished. The secret seems to lie in a little group of lawyers whom we can only see at this distance of time in the appreciative pages of Bracton. As Maitland has observed, this formulary system is distinctively English;—

> "but it is also, in a certain sense, very Roman. While the other nations of Western Europe were beginning to adopt as their own the ultimate results of Roman legal history, England was unconsciously reproducing that history; it was developing a formulary system which in the ages that were coming would be the strongest bulwark against Romanism and sever our English law from all her sisters."[2]

It was, of course, civil business—common pleas—which was most susceptible of this treatment; pleas of the Crown, which at this time were mainly criminal, had already been provided with a different machinery necessarily based upon the system of local government. Of these civil pleas, then, those which first received the attention of the King's Court were pleas of land. Reasons of state demanded that the Crown through its court should have a firm control of the land: the common law, therefore, was first the law of land before it could become the law of *the* land. But here, too, it was possible to argue that the existing local jurisdictions, communal and seignorial, were numerous enough and competent enough to administer real property law. In a sense this was true. Each landowner could litigate concerning his land in the court of

1 Bracton, f. 413 b.
2 2 *P. and M.* 558.

his feudal lord; if, as often happened, it was part of the dispute who was the feudal lord (such as when A claims to hold a piece of land of X while his adversary B claims to hold it of Y) then recourse was had to the lord who had feudal jurisdiction over both X and Y, and in this way such litigation would very likely come before the court of the King himself. Again, it may be that there were practical difficulties; the feudal court may be weak or partial, and then, too, recourse will be had to a higher court. Frequently it seems that a writ from the King will facilitate matters in seignorial courts, and the Crown at an early date would issue sharp admonitions commanding feudal lords to do immediate justice or else to explain their action in the King's Court. Such intervention was at first of a political or administrative character. The King used his influence, sometimes in the form of a threat, to set his vassal's judicial machinery in motion. For this there was Anglo-Saxon precedent,[1] and the early Anglo-Norman writ is undoubtedly continuous with the Anglo-Saxon writ (and here it must be remembered that the word "writ," in Latin *breve*, means nothing more than a formal letter of a business character; it does not necessarily imply either a court or court procedure).

Some of the earliest of our writs, therefore, are not, strictly speaking, documents directly instituting litigation. They are in form administrative commands to an alleged wrongdoer or to some inferior jurisdiction to do justice in a particular matter in such wise that the King shall no more hear complaints concerning it; disobedience of this writ will be punished in the King's Court unless a satisfactory explanation can be given. A writ of right, for example, may be in various forms. It may command the feudal lord of two contestants to do justice between them; but the Crown deliberately encroached upon seignorial jurisdiction when it devised a new variant which is called the writ of right *præcipe quod reddat* which soon became the most usual form. This writ completely ignores the feudal lord and is directed to the sheriff of the county where the land lies; he is instructed to command the defendant to render to the plaintiff the land which he claims, justly and without delay, and if he fails to do so the sheriff is to summon him before the King or his justices to show cause, and the sheriff is to return the original writ together with

[1] Note the passage in 2 Holdsworth, 171, 172 (quoted in Pound and Plucknett, *Readings*, 61, 62.

the summoners who witnessed its service. By the time we get to this form it is clear that we have only a slight disguise for a writ virtually initiating litigation in the King's Court in complete disregard of the lawful rights—property rights as they then were—of the feudal lords. The writ of right *præcipe quod reddat*, therefore, has its beginning in somewhat discreditable circumstances; the Crown, by sheer force, deprived feudal lords of their rightful jurisdiction. It was in vain that the insurgent barons extorted from King John a promise in the Great Charter that henceforward the writ called *præcipe* should not issue in such wise that a lord lost his court; though retained in all succeeding charters, this clause was never enforced. Indeed, the Crown invented a variety of other writs to the same effect, and there can be no doubt that the King's Court had opened war against seignorial courts.

At the same time it became an established principle that no freeman need answer for his land without a royal writ unless he chose. This rule is well known in the reign of Henry II and may date from the reign of Henry I.[1] Its effect was drastic; any defendant if he chose could have real property cases removed from seignorial courts into the King's Court. On the accession of Henry II, therefore, the operation of this principle, combined with the growing practice of issuing the writ of right called *præcipe*, had already given to the King's Court the basis of a very wide jurisdiction over land. Henry II improved the occasion by devising some new forms of action which again deliberately attacked the position of the lords. He modified the writ of right by allowing the defendant (or, more technically, the "tenant") to choose if he wished trial by a Grand Assize, which was a jury of twelve knights, instead of trial by battle. The principle of recognition, or jury trial, was further extended by Henry II in the establishment of the petty assizes. These were all modeled on the general principle that a person who had recently been evicted from the quiet enjoyment of his land was entitled to be restored. Bracton set the fashion of regarding these actions as definitely designed for the protection of possession as distinct from ownership, but it has recently been objected with a good deal of force that Bracton's use of these Roman terms "ownership"

[1] Above, p. 94.

and "possession" does not accurately fit contemporary English law. Into this question we cannot enter in any detail, but it is clear that the petty assizes (which Maitland and Holdsworth, following Bracton, call "possessory assizes") were based upon more than one consideration. "Disseisin," as such wrongful ejection was technically called, was viewed partly as a crime, and so a defendant who was found guilty would be fined and occasionally imprisoned. The maintenance of peace and order was, therefore, one element in the petty assizes; but there was also a strong element of tort, for the plaintiff very soon recovered damages, while at the same time it was a thoroughly real action, giving recovery of the land. In short, these assizes were designed to protect "seisin," which has been described most recently as being a conception peculiar to the middle ages; it is an enjoyment of property based upon title, and is not essentially distinguishable from right. In other words, the sharp distinction between property and possession made in Roman law did not obtain in English law; seisin is not the Roman possession, and right is not the Roman ownership.[1] Both of these conceptions are represented in English law only by seisin, and it was the essence of the conception of seisin that some seisins might be better than others. The most solemn action in real property law, the writ of right, merely ascertained whether the demandant or the tenant had the better right (without prejudice to third parties), by investigating which of them claimed on the older and better seisin. But although the writ of right would answer the serious question of the relative merits of the two titles according to the antiquity of the seisin from which they were derived, there seemed room for the invention of forms of action of more limited scope. If A unjustly and without a judgment disseised B of his free tenement, then it seemed reasonable that B should be restored to the enjoyment of his property upon satisfactory proof, first, that he was in quiet enjoyment (that is to say, seised), and secondly, that A had turned him out. There was surely no need in a situation such as this, which in fact was usually accompanied by acts of violence, to compel B, merely because he had been wrongfully evicted, to make out a title good enough and old enough to sustain a writ of

[1] Joüon des Longrais, *La Conception Anglaise de la Saisine*, whose views we have summarized in 40 Harvard Law Review, 921–925.

right and perhaps wage battle on it. It seems that we have here a trace of the influence of the canon law. The defendant in litigation had marked advantages over the plaintiff: he could interpose almost interminable delays, and even when the case finally came to be argued the plaintiff had to sustain a heavy burden of proof. And so one who had been disseised and attempted to recover by a writ of right was at a great disadvantage. To this problem the canonists found a solution. Naturally they applied it first to ecclesiastical matters, particularly in cases where a bishop had been ejected from his see by the lay power; one who has been ejected, they maintain, must before everything else be restored.[1] When he has been restored, and not until then, the rights and the wrongs of the case can be brought into question. Henry II's new action, the assize of *novel disseisin*, worked on these lines. One who had been ejected from his land was first of all to be restored. If the ejector wished to raise questions of title he could then proceed later on as demandant in a writ of right. Henceforth he could not pursue his claim by the too simple device of forcibly ejecting the tenant in seisin, thereby compelling him to assume the difficult rôle of a demandant in a writ of right. In its earliest form the assize of *novel disseisin* was thus subsidiary and preliminary to a writ of right. It was only natural, however, once the assize had passed, that the parties should in many cases be content with its verdict, and therefore the petty assize becomes a complete form of action and not merely a subsidiary to the writ of right. This idea was so attractive that Henry II applied it to several different situations, and by the end of his reign there were three petty assizes all fashioned on the same model. In the case of the assize of *novel disseisin* the original writ was directed to the sheriff of the county where the lands lay, commanding him, if the plaintiff gave security for prosecuting, to summon twelve free and lawful men who should view the lands in dispute and be ready to recognize before the King's justices whether the defendant had unjustly and without a judgment disseised the plaintiff of his free tenement. In the assize of *mort d'ancestor*, the assize of twelve is to recognize whether the plaintiff's ancestor was seised in his demesne as of fee of the tenements in dispute, whether he died since the period of limitation, and whether the demandant

[1] The maxim appears in the *False Decretals*.

is his next heir. The assize of *darrein presentment* applied the principle of *novel disseisin* to the difficult case of advowsons, and called upon the assize to say whether the plaintiff was the last patron in time of peace who presented a parson to the church in dispute. If so, he was seised, and is therefore entitled to present again. All three of these petty assizes ignored the court of the feudal lord; the assize of *mort d'ancestor* seems to have been definitely directed against the lords, for the defendant was frequently a feudal lord who refused to admit the heir of his deceased tenant to succeed him, and this assize therefore played a large part in the final establishment of the hereditary principle.[1] A fourth assize called *utrum* also began as a preliminary proceeding in order to ascertain whether litigious land fell under the jurisdiction of the Church or of the Crown, but in course of time the decision in this preliminary question became in effect a decision upon the principal question.[2]

We have seen that the petty assizes are based on the allegation that the tenant has obtained the land recently and wrongfully. The next step is to be seen in the writ of gage (which was another *præcipe*) demanding restitution of land which the tenant held lawfully at first, although later his title failed. In the case of the writ of gage it is alleged that the plaintiff made over his land to the defendant as security for a debt, and that since he is now ready to pay the debt the defendant has no more right to the land, but must restore it.

By the time we come to the reign of Henry III we find the beginnings of the *Register of Writs;* the forms of action are numerous enough to be collected in a formulary. Some new assizes are invented about 1237 expressly to supply the place of gaps in the assize of *mort d'ancestor;* originally the only ancestor from whom one could claim was father, mother, brother, sister, uncle or aunt. Special assizes are now provided for claims based upon the seisin of grandfather (*aiel*) and great-grandfather (*besaiel*) and from "cousins," which in law means all other relations (*cosinage*). "Great-great-grandfather by the use of the Chancery is called cousin." By this time it is clear that the

[1] Maitland (1 *P. and M.* 138) adopted the current view that this assize originated in 1176 at the Assize of Northampton; later he was inclined to date it earlier (Maitland, *Equity and Forms of Action,* 339).

[2] See above, p. 16.

King's Court begins to dream of something like a general jurisdiction over land without the slightest reference to the existing feudal courts. The result is the invention of a new and important group of writs called writs of entry. Like the writ of gage they expressly allege that the tenant only had entry into the land by a particular means which is set forth, thereby acquiring only a defective title. As time goes on a great variety of writs of entry is devised. At first the writ recounts all the hands through which the land has passed since the original defect, although there were limits placed upon the number of changes (whether alienations or descents) which could be alleged; finally, by statute demandants were allowed to say that the tenant had no entry save after (*post*) a particular defective title; dealings in the land subsequent to that event and leading down to the entry of the tenant no longer need be specified.[1] Of these numerous varieties of writs of entry it will only be necessary to say that they all ignore the lord's court and begin with the formula *præcipe quod reddat*. They were novelties in the time of Bracton, and the fact that it is impossible to say whether they are possessory or proprietary[2] is only proof that these terms imported by Bracton really do not fit contemporary English law.

In one or two cases they supplement the assize of *novel disseisin*. That assize only lay between the disseisor and the disseisee. If in the meantime the disseisor had died and his heir entered by descent, the assize did not lie against the heir. So in 1205 a writ of entry *sur disseisin* was established to cover this case. If, on the other hand, the disseisee died, the assize again was not available to his heir, and so the writ of entry "at common law" or "entry in the nature of an assize" filled the gap. Other varieties were entry *ad terminum quæ præterit*, which lay to recover lands against one who held them originally for a term of years, which term had expired. An action which was very common during the middle ages was entry *cui in vita* which lay for a widow to recover lands which were her own property, but which had been alienated by her husband, since she during his lifetime could not prevent his dealing with her property. If, however, the wife predeceases her husband, her heir can recover such lands by

1 Statute of Marlborough, c. 29 (1267); 2 *P. and M.* 71; Plucknett, *Statutes and Their Interpretation*, 80.

2 Maitland, *Equity and Forms of Action*, 338, 340.

a writ of entry *sur cui in vita*. It frequently happened that a dowress wrongfully alienated her dower, and by a writ of entry "at common law" the reversioner could recover such lands after her death. By statute, however, it was enacted that if a dowress alienated her dower the reversioner might obtain immediate entry (virtually a forfeiture) by a writ to be devised in the Chancery;[1] this was called entry *in casu proviso*. But it did not apply to alienations by other life tenants, and so after a famous incident between Chief Justice Bereford and the Chancery officials[2] a writ of entry *in consimili casu* was devised for use against tenants for life and by the curtesy.

In just one or two cases the King's Court was prepared to intervene in matters which did not involve land, although the forms which it used were almost identical. The writ of debt, for example, was in the same form as the *præcipe quod reddat*, and at first looks very much as if it were a real action; as Maitland has said, "the vast gulf which to our minds divides the 'give me what I own' and 'give me what I am owed' has not yet become apparent."[3] This is all the more clear with detinue which is again a writ of *præcipe quod reddat* demanding the restitution of a chattel, although the defendant has the option of returning the value instead of the chattel. Hence "Bracton is led to make the important remark that there is no real action for chattels—an important remark, for it is the foundation of all our talk about real and personal property."[4]

The writ of debt follows precisely the same form as the writ of right and was available for a number of purposes. It could always be brought upon "obligations," that is to say, debts acknowledged by deed under seal, and in such cases the establishment of the genuineness of the deed was conclusive. Where there was no deed under seal, debt could still be used to recover a loan, to collect the rent due upon a lease, the price upon a sale, and, later on, to enforce various statutory penalties. The action of debt, therefore, is fairly comprehensive, but as time goes by the defects of the action become more apparent. In the first place trial was by

1 Statute of Gloucester, c. 7 (1278).
2 *Year Book, 3 Edward II*, 16–19 (Selden Society).
3 Maitland, *Equity and Forms of Action*, 332.
4 *Op. cit.*, 342, 368, 369.

compurgation (wager of law),[1] and as the middle ages proceed this is felt to be increasingly irrational. And secondly, as with all the oldest groups of actions, a particularly complicated system of pleading grew up around it. As a result, from the beginning of the fifteenth century we see a tendency to avoid using the writ of debt and to make other forms of action serve its purpose.

The action of detinue was very similar, and it is evident that the two actions were originally one.

The action of account is particularly interesting and its history deserves more investigation than it has yet received. Originally it was used between a lord of a manor and his bailiff in order to compel the latter to account for the profits of the manor. The word "bailiff," however, gradually shifted its meaning, and by the end of the fifteenth century account could be used against certain types of bailees who had to be described as "bailiffs," although this allegation was not traversable.[2] This transition was assisted, no doubt, by the fact that quite early in its career the action of account could also be used between partners; when commercial matters appear in the *Year Books,* it is usually in actions of account.

The action of covenant is stated in some of the earlier sources to have very wide scope over contractual matters. The Statute of Wales in 1284 informs us that land or chattels may be demanded by the writ of covenant according to circumstances; "and forasmuch as contracts in covenants are infinite in their variety, it is impossible to mention each one in particular, but judgment is to be done according to the nature of each covenant and according to the statements and denials of the parties." It would therefore seem that covenant almost became a general contractual action. In local jurisdictions it remained so until comparatively late. In the county court we find it used as late as 1333 to obtain damages for breach of a covenant to use care in handling a borrowed fishing boat.[3]

The action of replevin was greatly used in the middle ages in circumstances such as these. When a lord distrained his tenant to perform services and the tenant desired to dispute his liability to

[1] Except when a sealed deed was the basis of the demand.

[2] See the details in Plucknett, *Words* (14 Cornell Law Quarterly, 263, 270).

[3] Plucknett, *New Light on the Old County Court*, 42 Harvard Law Review, 666, citing Morris, *Early English County Court*, 185.

do them, he could recover possession of the chattels distrained by giving security to the sheriff for maintaining his contention in a law court. The procedure was then for the tenant to declare that his beasts were taken, to which the lord might reply by denying that he took them, or else (and this was almost universally the case) by admitting the distress and disclosing the reasons—such as services and rents in arrear, homage not performed, relief unpaid, etc. This is technically called an "avowry," and in this form of action a great number of questions relating to the feudal relationship could be conveniently raised.[1] If the lord's case is proved, judgment is given that he shall "have the return;" that is, the chattels which he originally distrained and which the sheriff restored to the tenant are given back to the lord by judgment of the court to hold again as a distress. In early times if the question of the ownership of the chattels was raised in replevin, it was determined by interlocutory proceedings called *de proprietate probanda*. In the early fourteenth century the convenience of the action of replevin led to determined attempts to make it serve the purpose of certain older actions, and these attempts were nearly successful; in the fifteenth century we have this distinction drawn by Chief Justice Newton: "If you have taken my beasts, it is in my choice to sue replevin (which proves property in me), or to sue a writ of trespass (which proves the property in him who took them); and so it is in my will to waive the property or not." [2] By this time it was settled doctrine that even a thief acquired property in the stolen goods. We therefore have here in the choice between replevin and trespass a curious parallel to the doctrine of disseisin at election in real property law.

We now come to the action of trespass. A number of theories concerning its origin have been proposed and the matter must still be regarded as open to controversy. According to one theory the action of trespass developed from the old appeal.[3] According to this view the changes which took place were as follows: the appeal of larceny (like the appeals of murder, mayhem, or other felony) was in very truth a "form of action" for criminal matters. The injured party pursued the trail, caught the criminal,

[1] See the extract from Stephen, *Principles of Pleading*, in Pound and Plucknett, *Readings*, 408.

[2] *Year Book 19 Henry VI*, cited in Ames, *Lectures on Legal History*, 69, 70.

[3] Holmes, *The Common Law*, 3, 4, 101, 102; Ames, *op. cit.*, 56–61.

and then formally charged him with the crime. The action concluded with trial by battle; if the plaintiff was successful he recovered the stolen property, and if he had not already slain the thief in battle he was expected to hang him. Gradually, means were found for substituting jury trial upon the appellee's allegation that the appeal was only brought by hate and spite (*de odio et atia*). Technically a side issue tried by jury, in fact it went to the root of the case. If trespass developed from the appeal, then the changes must have been these: first, where the stolen goods were no longer forthcoming, the plaintiff in trespass is now able to recover their money value from the defendant; this seems to have been impossible by the appeal. Secondly, words of felony must be omitted; this was already optional in an appeal, which could thus be changed from a criminal into a civil action.[1] This, it is suggested, naturally led to the idea of trespass. Another theory would regard the action of trespass as having its origin in the assize of *novel disseisin*.[2] The assize only gave recovery of the land; it was always uncertain whether chattels which had been on the land (most commonly crops) could be recovered—if they had been consumed, at first there was no remedy. Hence the assize of *novel disseisin* was modified so as to give damages representing the value of those chattels removed in the course of the disseisin whose restoration was impossible. And so in this way, too, the element of damages in trespass has been accounted for. In the present state of our knowledge it is very difficult to decide between these rival theories. If we may be so rash as to confound the confusion by offering a third theory, it would be to suggest that in this, as in other matters, the King's Court was adopting methods already in use in the local courts. From local customs which are still extant we can trace the gradual change (which in fact was not a very great or fundamental one) between the Anglo-Saxon *bot* and the later damages. The idea of damages, therefore, has no necessary connection with trespass, being indeed much older, and there is no doubt that there were forms in use in the local courts whereby these damages could be obtained. If this would explain the nature of the remedy, it still remains to determine the origin of the form which the royal courts adopted. In

1 Bracton describes this form as an action *de re adirata*.

2 Woodbine, *Origins of the Action of Trespass*, 33 Yale Law Journal, 799–816; 34 *ibid.*, 343–370.

the writs of trespass there is a constant formula. The King orders the sheriff to summon the defendant (or else to take pledges for his appearance) to show in the King's Court why (*quare*) he did certain things. In the enrollment of such cases upon the plea rolls the recital of the writ is immediately followed by the words "whereof A. B. (the plaintiff) complains that . . . (*unde queritur quod* . . .)." It may be that in these words we have a clue to the origin of the form through which the royal courts gave remedy by damages. The political crisis in the middle of the thirteenth century coincided significantly with the settlement of the form of trespass. In the course of the enquiries into abuses by royal officials which then took place, great use was made of a vague procedure of complaint (*querela*). In these circumstances anyone could complain of the oppressions of public ministers, and the enrollment of these complaints is curiously similar to that of an action of trespass.[1] It is not without significance that in France, too, the Crown was developing machinery whereby such complaints could be heard. According to this hypothesis the procedure of complaint against public officials was extended to complaints against any wrongdoers in general, and this, combined with the already existing idea of damages in local jurisdictions, would give us all the elements of trespass. However, no final settlement of these controversies is possible until more plea rolls of the earlier thirteenth century are available in print.

In any case we soon find the development of several varieties of the action of trespass. Among the earliest types of trespass are the following: there is a trespass for assault and battery, and trespass *de bonis asportatis* for chattels carried away, and trespass *quare clausum fregit* for trespasses to real property. Another special form of trespass is *de ejectione firmæ*. This lies for a lessee against anyone[2] who ejects him, and gives him damages, although not the recovery of his term. At the close of the fifteenth century it would seem the courts finally decided to allow the lessee to recover his term as well by this writ, and soon afterwards this

[1] For discussions of the *quare* group of actions and of the *querela*, see Jacob, *Baronial Rebellion and Reform*, 65; Adams, *Council and Courts*, 348; Woodbine in 34 Yale Law Journal, 349–356.

[2] There was already an older action *quare ejecit infra terminum* whose usefulness was very limited as it only lay between rival lessees who both claimed to hold from the same lessor. For more as to the termor's remedies, see below, p. 366.

great change enabled it to be used instead of most of the old forms of real action. When two parties wished to try the title to a piece of land, one of them leased it to an imaginary person (John Doe), and the other similarly leased to another (William Styles). One lessee ejects the other (this will be all fiction), and in order to try the rights of the rival lessees the court has to enter into the question of the rights of the lessors. This procedure was known as *ejectment*, and after the close of the middle ages was the principal method of trying title to land. The nominal plaintiff in such actions was the fictitious John Doe on the demise of the real plaintiff; and so an action which to-day would be called *A* v. *B* used to be described as *Doe d. A.* (that is, *Doe* on the demise of *A*) v. *B*. The fictitious William Styles was usually replaced by his lessor, for in the earlier proceedings the plaintiff's solicitor writes a letter to the defendant in the name of "your loving friend, William Styles," asking the defendant to defend Styles's interest. Useful as it was, ejectment did not entirely supersede the old real actions. In 1852 the fictitious John Doe was abolished by statute, and in 1875 this, together with all other forms of action, was abolished.

This, however, is only one of the strange adventures which befell the action of trespass, for throughout the middle ages and down to the seventeenth century trespass continues to develop new varieties, which in time become separate forms of action. The action of case is an early example. This was a variety of trespass brought "upon a special case"—and here it may be remarked that it has no connection, as far as can be seen, with the Statute of Westminster II, c. 24, the so-called Statute *in Consimili Casu*.[1] In the reign of Edward III examples occur of writs of trespass being upheld although the wrong they complain of does not always consist of a direct application of unlawful physical force to the body, lands, or goods of the plaintiff. The words *vi et armis* are omitted, and so, too, is sometimes the allegation of a breach of the peace. At first these actions were simply described as trespass, but soon the profession took the habit of calling them "case." Already in 1390 we find trespass and case distinguished.[2] By the sixteenth century case covers a miscellaneous field, notably libel and slander, negligence, and deceit. In many cases the dis-

1 Maitland, *Equity and Forms of Action*, 345, 346, states the old view, but with obvious hesitation.

2 *Year Books 13 Richard II* (ed. Plucknett), 104.

tinction between case and trespass is obscure, although nevertheless important.

Case itself then begins to subdivide into various sorts, which in their turn become new forms of action. The first to appear is *assumpsit*, which very soon enters into competition with the action of debt for the field of contract, as we shall see later. *Assumpsit* becomes clearly distinguished from case about 1500.

Another branch which develops from case is the action of *trover* which lies upon a fictitious loss of chattels by the plaintiff, a "casual finding" of the chattels by the defendant (equally fictitious), and his conversion of them—and this is the gist of the action. Just as forms of *assumpit* replaced debt, so in the seventeenth century trover[1] replaced detinue.

By the end of the seventeenth century, therefore, the great bulk of the litigation of the Kingdom was conducted through the various forms of action which had developed from trespass, and this remained the case until the nineteenth century, when first of all the real actions, and finally, in 1875, all remaining forms of action, were abolished by statute and replaced by a single uniform writ of summons upon which the plaintiff endorses his statement of claim.[2]

[1] In this country replevin was more often used in place of detinue, although in England the scope of replevin was practically restricted to distress. See Stephen, in Pound and Plucknett, *Readings*, 408.

[2] For the corresponding reforms in this country, see Pound and Plucknett, *Readings*, 408–411.

CHAPTER III

LEGISLATION

At the present day the most powerful instrument for legal progress in the hands of the State is legislation. Every modern nation possesses one or more legislatures—in this country, over four dozen—which are all extremely active. Immense quantities of statute law are produced every session; a great deal of it, no doubt, is concerned with problems of administration and police, but nevertheless at the present day it can no longer be denied that legislation has a large place in modern legal systems. Few topics in legal history are more interesting than the rise and progress of legislation, the development of special bodies for the purpose of making statute law, and the attitude of the law courts in applying and interpreting the results of their labors.

Professor Jenks has developed the interesting thesis that legislation was only known to the middle ages through Roman law. According to this view true legislation is the product of Roman ideas; if these ideas are present, then legislation must be regarded as a conscious imitation of Roman practices; if these ideas are absent then we find likewise an absence of true legislation. The early Germanic laws under this theory are not really legislative, but only official memoranda of tribal custom. When, however, the barbarians had settled down within the old Roman Empire, and had become familiar with its political ideas, we begin to find the appearance of express legislation. Indeed, Professor Jenks would go so far as to say that "just as a party of savages will disport themselves in the garments of a shipwrecked crew, so the Merovingian and Carolingian kings and officials deck themselves with the titles, the prerogatives, the documents of the imperial State. No doubt the wisest of them, such as Charles the Great, had a deliberate policy in so doing. But the majority of them seem to have been swayed simply by vanity, or ambition, or admiration."[1] One of the most striking functions of the Roman

[1] Jenks, *Law and Politics in the Middle Ages* (2d ed.), 17.

Emperor was his power to legislate, and the Carolingians likewise produced a considerable body of legislative acts called "capitularies." These instruments are partly administrative, being substantially instructions to royal officials, but some of them are beyond doubt truly legislative, and openly profess to introduce new law. It is perfectly clear that they were an important element in the machinery of government throughout the ninth century. With the fall of the Carolingian Empire at the close of that century, the Roman imperial idea suffered an eclipse. The tenth and eleventh centuries are the periods during which central authority completely failed, and was replaced by the extremely decentralized form of government which we call feudalism. "If we leave England out of sight there is an almost unbroken silence in the history of Teutonic law during the tenth and eleventh centuries. The Roman Empire, real and fictitious, is dead, and with it the idea of legislation, if not of law. When the idea revives again in the prospering France of the thirteenth century, we find the legist asserting the royal power of legislation in maxims which are simply translations of the texts of Roman law. 'That which pleases him (the King) to do must be held for law,' says Beaumanoir. A century later Boutillier is careful to explain that the King may make laws 'because he is Emperor in his realm.' "[1]

It is a difficult question to decide how far this theory can be applied to the special facts of English history. Mr. Jenks insists that the Anglo-Saxon laws are really declarations of custom, and do not become truly legislative until the reign of Egbert, who had visited the court of Charles the Great, and there learnt the imperial idea. However, if this theory is to be applied to English legal history at all, we shall have to start earlier than Egbert. The very first Anglo-Saxon law we possess, two hundred years before his day, contains matter which surely must be legislative—it is largely concerned with making provision for a completely new class of society, namely, the clergy, which previous to this date had not existed. Here, surely, was a piece of radical legislation. If we are to find imperial influence in this, it is to the Church rather than to the Empire directly that it must be ascribed, and there is no doubt that the early Christian missionaries to England deliberately adopted the policy of magnifying the kingly office.

[1] Jenks, *op. cit.*, 21.

In fact, whatever its ultimate origin may be, we find a fairly constant stream of legislation from the very beginning of authentic Anglo-Saxon legal history about the year 600 continuously down to the present day. Of course, at some periods this legislation was more important than in others; for quite long stretches of time we find only comparatively trivial matters, but nevertheless, when radical legislation became necessary, there were the power and the machinery to effect it.

Needless to say, legislative methods have changed in the course of thirteen hundred years. Under the Anglo-Saxon kings there was no part of the government which could be described as a legislature. It is impossible in the present state of our knowledge to ascertain the relative influence upon legislation of the King, the clergy, the nobles, and the King's more intimate advisers. It may very well be that the Anglo-Saxon assemblies which were frequently associated with legislation were modeled upon ecclesiastical councils—indeed, it is sometimes impossible to distinguish a royal Witan from a Church council.

The Norman Conquest made little change in the general attitude toward legislation, save to enhance the position of the Crown, assisted by a small, intimate and informal Council. Legislation still continued, and William the Conqueror effected a good many important changes; he abolished the death penalty for certain offenses, and penal slavery,[1] and made radical changes in the constitution of the hundred court.[2] If we find no legislation under his second son and successor William II, we soon find that his third son, Henry I, did something towards resuming the practice. In 1101 he issued a Charter of Liberties,[3] and from that time forward the Charter becomes a frequent form of legislation. Large portions of this Charter, no doubt, consist of a withdrawal of certain oppressive claims by the Crown which were of doubtful legality; other parts, however, seem definitely to establish new rules in the place of old ones; various feudal dues, for example, instead of being arbitrary, were reduced to "reasonable" limits, and this was clearly a change in the law; moreover, the Charter concludes with a grant of the law as it was under Edward the Confessor, "together with those revisions which my father (William the

1 *Hic Intimatur*, c. 10 (in Stubbs, *Select Charters*, 8th ed. 83–85).

2 Above, p. 14.

1 Above, p. 18.

Conqueror) made by the advice of his barons." In short, Henry I maintains the legislative changes which William the Conqueror made in Anglo-Saxon law. He also restored capital punishment in those cases where it had been abolished.[1]

It is when we come to the reign of Henry II that we find the first great outburst of legislation. The forms which it took were various. Instead of the ancient and solemn charter we find more frequently the assize, but in most cases the text is no longer extant and as a rule we have to depend upon chroniclers for our information. Thus we have the Assize of Clarendon in 1166 which was made with the assent of all the prelates and barons of England, and is in form an expression of the King's will. Several assizes during his reign established new forms of trial by inquisition or jury, and established new forms of action in the law of real property. At the same time what professed to be ancient custom was ascertained and declared by the remarkable procedure of an inquisition consisting of all the "prelates, nobles and ancients of the healm" in the Constitutions of Clarendon (1164).[2] Under his sons Richard I and John we have only the Great Charter of 1215, which, although largely declaratory of ancient custom, was still in other respects legislative, in several cases substituting new rules for old. During the next ten years the Charter was three times revised and much of the first Charter was abrogated—and it must be remembered that the repeal of existing law is just as much legislation as the introduction of new law.

During the long reign of Henry III legislation becomes steadily more frequent. A good deal of it is already known, but it is certain that there is still more awaiting discovery on the voluminous rolls in the Public Record Office.[3] The charter still continues to be a form for the most solemn type of legislation, but others also occur. Brief and informal instructions to Justices in Eyre were a particularly convenient method for introducing new rules and practices into the law. In 1236 we find the Provisions of Merton, which all the old collections of statutes agree in treating as the earliest English statute. There is, of course, no real basis for this tradition; there are other documents upon the public records of an earlier date which can be regarded as legislation with equal

1 2 *P. and M.* 461.

2 Summarized above, pp. 15–16.

3 Valuable references are in 1 *P. and M.*, 189 n. 4; Cf. one such example translated above, p. 106.

justice. The Provisions (or Statute) of Merton long remained important, particularly in matters of commons, in which it was invoked as late as the eighteenth century. In the middle of Henry III's reign a revolutionary body of barons established a special machinery for the purpose of legislation, and the Provisions of Westminster (1259) were the result; and when finally the revolution came to an end, most of the Provisions of Westminster were re-enacted in a more regular form in the great Statute of Marlborough (1267).[1] Indeed the Statute of Marlborough really belongs to the great group of legislative acts which took place in the next reign, for there are only eight years between it and Edward I's Statute of Westminster I in 1275.

This brings us to the greatest outburst of legislation in England during the middle ages; it was only equalled in extent and importance by that of the first half of the nineteenth century.[2] It will therefore be well at this point to examine very briefly the available forms and methods of legislation existing in the reign of Edward I. The forms, to begin with, were extremely varied. We have already mentioned the form of the charter, and it must be remembered that the charter is really a conveyance, and that the various charters of liberty which we have mentioned are drawn in identically the same form as a conveyance of real property. The Great Charter of 1215, for example, announces that "we have granted and by this present charter confirmed for us and our heirs forever" the following liberties, "to have and to hold to all the freemen of the realm and their heirs, of us and our heirs"—which is exactly the form which would be used in a grant of lands. The Provisions of Merton which we have already mentioned similarly use the word "grant," although here we find that the grant is embodied in a form which becomes more frequent henceforward—the provision. They begin thus:

"It is provided in the King's Court on Wednesday[3] after the feast of St. Vincent in the twentieth year of the reign of King Henry, the son of King John, at Merton in the presence of the Archbishop of Canterbury and the other bishops and the greater part of the earls and barons of England there present for the coronation of the said King and of Eleanor,

[1] For its significance, see above, p. 27.

[2] The general nature of Edward I's legislation has been described above, pp. 28–30.

[3] 23 January, 1236.

the Queen (for which purpose they were summoned), after discussion of the common good of the realm upon the articles underwritten: wherefore it was provided and granted. . . ."

Here we clearly see a form which is halfway between the charter which technically moved from the King alone, and the later statute which was made in Parliament. The Statute of Marlborough (1267) is in a rather peculiar form, and this may perhaps be attributed to the presence of several distinguished foreigners. It bears the title "Provisions made at Marlborough in the presence of King Henry, and Richard, King of the Romans, and of Edward, eldest son of the said King Henry, and of the Lord Ottobon, then papal legate in England," and begins with a short preamble.

All these documents were in Latin; the First Statute of Westminster (1275) is somewhat unusual in being in French. It also adopts a French word for legislative acts, *établissement,* which is reminiscent of the legislative acts of Louis IX bearing the same name. The Statute of Gloucester three years later (1278) is also in French and claims to have been "established and ordained," the King himself "providing" for the amendment of his realm with the concurrence of the most discreet persons in the Kingdom, both great and small. The Statute of Mortmain (1279), on the other hand, which is in every way as important as the preceding, is simply in the form of an administrative instruction addressed to the Justices of the Bench. The Statutes of Merchants[1] (1283 and 1285) are in French and recount that "the King by himself and his Council" had ordained and established the matters following; the Statute of Westminster II (1285), however, is in Latin and sets the form for subsequent statutes, although for a long time deviations are not uncommon. We now find that "the Lord King in his Parliament at Westminster after Easter on the thirteenth year of his reign caused to be recited the many oppressions and defects of the laws, with a view to supplementing the statutes made at Gloucester, and published these statutes following." Here we get a form which is clearly and consciously legislative. The Statute of Winchester, however, in the same year, professes to be nothing more than the command of the King alone, no Parliament and not even a Council being mentioned.

[1] The earlier is sometimes called the Statute of Acton-Burnel.

So far it is clear that these legislative acts ran in the name of the King and very probably were initiated by him or by his most intimate councillors; there is as yet no necessary connection between legislation and Parliament. In the reign of Edward I we find some extremely important legislation which seems to have emanated from the King in Council alone, or at most from a Council in Parliament, but we find no mention of the Commons: so, too, with the Statute of Westminster II and many others. On the other hand some of his statutes profess to have been made "by the advice of the barons, earls, magnates, great men and other nobles, and of the commons of the realm in Parliament" (Statutes of Carlisle, 1305 and 1307). There is, however, no legal difference whatever in the effect or authority of statutes produced in these different ways. As far as we can see, a statute in the reign of Edward I simply means something established by royal authority; whether it is established by the King in Council, or in a Parliament of nobles, or in a Parliament of nobles and commons as well, is completely immaterial. It is equally immaterial what form the statute takes, whether it be a charter, or a statute enrolled and proclaimed, or merely an administrative expression of the royal will notified to the judicial authorities by means of a letter close (which at this period was a species of interdepartmental correspondence). In short, while we are in the reign of Edward I we feel the typical mediaeval atmosphere, which was, above all, intensely practical. The great concern of the government was to govern, and if in the course of its duties legislation became necessary, then it was effected simply and quickly without any complications or formalities. Even after parliamentary legislation had begun to appear, we still find that the Council exercised a preponderant influence and that among the councillors were frequently to be found the judges, for it is only natural in so practical an age that the Council should call upon the judges to draft legislation, and such in fact was the case.

These variations both in form and method—

"seem to be the direct result of what was then the novelty of enacted law, which as yet had not become a regular product of the routine of government. This conclusion can be confirmed by an examination of the circumstances under which some of the most famous of our early statutes were passed. Several will be seen to have resulted from what would be described to-day as 'direct action.' The barons in arms dictated *Magna*

Carta, and a military crisis eighty-two years later put it on the statute roll. The Provisions of Westminster originated in what Stubbs called a 'provisional government,' and it was only as part of the pacification following the Barons' War that they became incorporated in the Statute of Marlborough. The 'New Ordinances' of 5 Edward II were likewise the product of a revolutionary movement. One statute—that of Bigamists, c. 5—is an interpretation of a papal constitution." [1]

As Professor Winfield remarks:

"The enactment may resemble a grant of lands, a proclamation of successful revolutionaries, a treaty of peace dictated by conquerors, a bargain between two contractors, or a writ to the judges, precisely as it originated in a gift of the King, a fight against the King, an agreement with the King, or an order by the King." [2]

At various times we find a distinction drawn between statutes and ordinances. Down to the middle of the fourteenth century the words are used interchangeably, and it is only in the latter part of the century that some sort of distinction begins to appear. It seems to take the line of discriminating between those acts which received the consent of the King, the Lords and the Commons, and those in which one of these consents was absent.[3] As we have seen, in the fourteenth century legislation was none the worse for being extra-parliamentary; as a late example it may be observed that the Ordinance of Laborers (1349) was constantly applied in every respect as if it had been a parliamentary statute, although it had no parliamentary authority until it was included in a general confirmation of all labor legislation nearly thirty years later.[4] Indeed it may be that this tardy grant of parliamentary sanction is an early case of doubts first appearing as to the validity of non-parliamentary legislation. For the rest, ordinances have played a very small part in English public law,[5] if we are to except the thirteenth and early fourteenth century examples, which, moreover, as we have seen, were not distinguished from statutes by contemporaries.

As we pass through the fourteenth century, parliamentary legislation becomes more and more general. Not only does the King

[1] Plucknett, *Statutes and Their Interpretation*, 9.

[2] Winfield, *Chief Sources of English Legal History*, 72, 73.

[3] Plucknett, *Statutes and Their Interpretation*, 32 34; Holdsworth, *Sources and Literature of English Law*, 48.

[4] Putnam. *Enforcement of the Statutes of Laborers*, 179.

[5] Coke revived the controversy.

use Parliaments for the purpose of giving authority to his own decrees, the Parliament merely ratifying decisions which have really been reached by the Council, but we also find that Parliament will request the Crown to legislate upon some particular matter. At first we find general complaints put into the form of a petition, either of particular members or of outsiders and local bodies, as well as petitions of the whole Commons. Such a petition will state a grievance and pray for a remedy. When the Parliament is over, the Council will consider these requests at its leisure, and if it thinks legislation is necessary it will prepare it according to its discretion and publish it as a statute with parliamentary authority. As the Commons grow more powerful politically they express increasing dissatisfaction at the working of this method. Sometimes the government failed to act at all upon a petition: at other times we find the Commons complaining that although they had petitioned for one thing, the Council had legislated along different lines of which they did not approve. Henry V promised that "from henceforth nothing be enacted to the petitions of his Commons that be contrary to their asking whereby they should be bound without their assent."

In the fifteenth century, in fact, the Commons were strong enough to adopt a new system which had in fact first been used for government business. This consisted of presenting a petition which contained the exact form of words which the Commons prayed to be enacted, and this left no choice except that of accepting or refusing, although even at this late date there were doubts whether the consent of the Commons was always necessary. When we get to this stage we can rightly regard Parliament as being a legislature. In the fifteenth century also it becomes the regular practice for statutes to be written in English, instead of in French as in the fourteenth century, or Latin in the thirteenth.

As we enter the Tudor period we begin to see clear traces of modern parliamentary procedure, the system of three readings and so on. A word may perhaps be said on the method of citation of statutes. The oldest method was exactly the same as that used by the civil and canon lawyers, and consisted of calling each statute by the first words. In a few cases this practice has survived; we still speak of the Statutes *De Donis*, *Quia Emptores*, and the rest, and in the fourteenth century there were many more. As

Parliaments became more frequent statutes were cited according to the place where the Parliament sat; we therefore have the Statutes of Gloucester, York, Northampton, etc., and numerous Statutes of Westminster. With the growth of statute law it became necessary to have a more precise system, and by the close of the fourteenth century statutes are cited by date (that is by the regnal year). The Statute of Westminster II, therefore, may also be cited as Statute 13 Edward I. Generally, although not always, the legislation of one Parliament is published altogether in one document, which will therefore contain a number of unrelated matters. For convenience such a long document is divided into chapters; the numbering of the chapters is common in fourteenth century manuscripts although we do not find it on the rolls; and so citations will take the form of the regnal year followed by the number of the chapter. Occasionally we find more than one of these long statutes in a single year, and the modern printers have made a practice of numbering these as separate statutes. Unfortunately there was no uniformity, and indeed no official prints at all, until the publication of the *Statutes of the Realm* between 1810 and 1825 in nine immense folio volumes. At the present day citations of statutes earlier than 1713 (at which date the *Statutes of the Realm* end) are usually made according to the regnal years and numberings in this edition, which moreover has received a certain amount of parliamentary sanction. In the eighteenth century the citation of statutes became more complicated, for Parliaments lasted longer and their sessions overlapped the regnal years. If the whole of a session falls within one year there is no difficulty, but if it overlaps all of its acts are described as of both years.

"To take a concrete case, let us see how the system is working at the present moment. King George V came to the throne on May 6th, 1910. After the 1924 general election a new Parliament began in November, 1924, that is to say in the fifteenth regnal year of His Majesty. Any acts passed in March or April of 1925 are consequently referred to as being of the regnal year '15 Geo. 5.' Parliaments being mortal, it is not safe to assume in April of 1925 that the session will endure until the sixteenth regnal year. But, as soon as the session has got past the date of May 6th, it has spread itself over two regnal years; therefore acts passed in June or July of 1925 must be referred to as of '15 & 16 Geo. 5.' Indeed it seems to be the better opinion that even the acts passed before May 6th and hitherto labelled by the single year (15 Geo. 5) should at this stage

attract to themselves the second year and thereafter be cited by reference to the two regnal years (15 & 16)."[1]

So much then for the forms and methods of legislation. We must now consider the authority and the interpretation of these documents. As for their authority we find very little question. Indeed, there seems a curious tendency to extend statutory authority to a variety of documents, some of them of very questionable origin. An important case as recorded upon the Parliament rolls in the course of time will acquire the reputation and name of the Statute of Waste.[2] A few useful extracts from Bracton will also be referred to during the middle ages as statutes. The term "statute," therefore, is a decidedly inclusive one, and it is not often that we find a reputed statute questioned. Occasionally we find suspicions expressed because a particular document has not been sealed — the meaning of which is far from clear. Sometimes a very cautious litigant who is relying upon a recent statute will go to the trouble of having an official copy authenticated under the Great Seal, and of bringing it into court. On such occasions it would seem that the court took the precaution of enrolling the statute in question as part of the pleadings. Indeed, it is extremely curious that there was more difficulty in pleading a very recent statute than an old one. The courts seem to have felt a certain reluctance when faced with the problem of applying a statute for the first time. Moreover, it must have been quite difficult in the fourteenth century to decide whether a particular text was a statute, and, if so, what exactly its words were. From the *Year Books* it would seem that the bench did not always have a copy of the statutes at hand. On those occasions when the bench did examine a copy of the statutes, the *Year Books* are careful to report the precise words as they were read; more than that, it is not unusual to find statutes even then seriously misquoted. In at least one case everybody concerned seems to have been unaware that a certain statute had been repealed. It is therefore not surprising that there have grown up certain legends as to the operation and effect of particular statutes which have no historical basis.

From all this it will be clear that the mediæval statute had

[1] Carr, *Citation of Statutes*, in Cambridge Legal Essays, 72.
[2] Plucknett, *Statutes and Their Interpretation*, 23.

very little in common with modern legislation. If it was possible to handle these enactments with such easy unconcern as to their authenticity and precise content, then obviously there is no trace of the modern notion that every letter of the statute may be significant. This impression is confirmed when we examine the way in which statutes were interpreted in the fourteenth century. Sometimes their wording is strictly applied; sometimes it is stretched very considerably; sometimes the court finds it necessary to restrict the operation of a statute which was too widely drawn; on other occasions the court simply refuses to obey the statute at all. But in this connection two points must be emphasized.

"First, the courts undoubtedly did disregard statutes when they thought fit, and secondly, they expressed no principle of jurisprudence or political theory which would serve as an explanation—still less as a reason—for their attitude. The evidence has been recited here with as little gloss as possible, and the absence of any discussion in the reports of the juridical and constitutional questions involved is really its most significant feature. Only one explanation is possible, and put quite simply it is this—that such questions as these were not asking during our period. If reasons of however great technicality made it desirable to neglect some words of a statute, then they were quietly set aside, but in doing so neither counsel nor judges enquired into the nature of statutes and legislation, the sovereignty of Parliament, the supremacy of the common law, the functions of the judicature, and all the other questions which the modern mind finds so absorbingly interesting. They made no fuss about it, either. No sensational judgment that a statute was 'void,' no thrilling vindication of the common law and *Magna Carta*, nothing of the judges' professional pride as Coke felt it, will be found in these cases. The reporters note them in just the same way as all the other cases, and with as little expression of surprise or question. It is needless to pretend that such a state of mind is easy to imagine, but on the other hand it is not impossible in these days when historians recognize the value and the necessity of thinking in unfamiliar dimensions. We shall be getting nearest the truth, it seems, when we remember that the fourteenth century was in urgent need of good law, firmly enforced, for then we shall understand that the judges' great preoccupation was to apply the best law they knew as courageously as they could, and that our modern difficulties, whether political or juridical, to them would have seemed, if not unintelligible, at least irrelevant and pedantic." [1]

In the middle of the fourteenth century this free and easy attitude begins to disappear. We are beginning to find statements in the *Year Books* that statutes ought to be interpreted strictly,

[1] Plucknett, *Statutes and Their Interpretation*, 70.

while in other matters, too, the bench is less confident in using its ancient powers of discretion. By 1340 or thereabout the Court of Common Pleas had developed an elaborate procedure which required considerable technical skill to work. More than that, the intimacy between the Council and the judges which had been such a feature of Edward I's reign had almost ceased. As a result the judges no longer felt themselves in the position of councillors whose nearness to the King enabled them to exercise the wide royal discretion which, as we have seen, was the privilege of the King's closest advisers. Instead, the Court of Common Pleas regards itself as a government department whose function is to carry out its duties along prescribed lines. At about this time, therefore, we find such statements as that of Hilary, J., that "we will not and cannot change ancient usages," and "statutes are to be interpreted strictly," while at the same date we see the earliest distinctions drawn between strict law and equity. Then, too, it is highly significant that at this very moment the Chancery begins to appear as a court exercising the Council's discretion.[1] Towards the middle of the fourteenth century, therefore, the judges begin to interpret statutes strictly. No longer are they to be regarded as merely suggestions of policy within whose broad limits the court can exercise a wide discretion. Instead they are regarded as texts which are to be applied exactly as they stand, and so we find the beginnings of a radical separation into two functions: the first legislates and establishes a text, and the second adjudicates and interprets the text. This separation was momentous for English history, for more than anything else it promoted the isolation of the law courts and the judges, enabling them to develop an independent position and to act as checks upon the executive and as critics of the legislature. This became all the more significant since the legislature inevitably became a political body controlling the executive; the courts now stood outside of both. This division of labor into law-making and law-interpreting was not yet generally accepted in fourteenth-century thought: the canonists had a maxim that interpretation properly belonged to the power that ordained, which alone could authoritatively interpret its own acts. We even find the Council making the same claim in England in

1 Plucknett, *Statutes and Their Interpretation*, 121.

1259 when the triumphant barons, using the King's name, warned the Bishop of Durham that—

"in view of the fact that the declaration and interpretation of law and custom belong to us and our nobles, and none other, we of the counsel of our nobles forbid you, as you would desire to use those royal liberties which you pretend are yours, to put any interpretation on them contrary to the laws and customs current in our realm." [1]

As late as Coke's day, Lord Ellesmere is credited with the view that it would be more rational for statutes to be interpreted by Parliament which made them, than by the law courts. It is clear that in the fourteenth century the Council exercised these powers, for we have several documents in which the Council "expounds" and even "corrects" statutes.[2] It is equally clear, however, that there was no conscious theory on the matter, and practice was still uncertain until in the middle fourteenth century the definite separation begins, and legislation becomes a different function from adjudication.

As we pass through the fifteenth century to the sixteenth and the age of Coke, we find the courts applying themselves with great diligence to the task of interpreting statutes, which to this day is one of the most difficult functions which a judge has to perform. Shorn of their discretion, the common law judges took refuge in logic. Attempts were made to devise rules whereby the grammatical structure of a sentence, combined with a general consideration of the nature of the act, could be used as a guide to the interpretation of the text in question. Some statutes confirmed or amended previous law; others removed abuses; some commanded things to be done, while others prohibited certain actions; some statutes conferred benefits and others were penal. Combined with these general considerations a statute might be drawn in affirmative or negative terms, and out of all this the courts elaborated a system of great complexity.[3] All the time there had to be considered also the policy and general intention of the act, and here historical changes are strikingly apparent. In our earliest *Year Books* the judges had no difficulty in saying what

[1] Jacob, *Baronial Reform and Rebellion*, 7.

[2] Plucknett, *Statutes and Their Interpretation*, 21.

[3] See the outline in 1 Blackstone, *Commentaries*, 59–61, 85–91, and 1 Kent, *Commentaries*, 454–468 (both reproduced in Pound and Plucknett, *Readings*, 40–42, 252–269.

the intention of an act was. The famous Justice Hengham, for example, settled a difficult question in these words, "We agreed in Parliament that the wife if not named in the writ should not be received," and when counsel suggested an interpretation of another statute, Hengham again had an authoritative answer: "Do not gloss the statute," he said, "for we know better than you: we made it." In short, the court was well aware of the intention of a statute because the judges had had the biggest share in making it, and consequently there was little difficulty; the lawmaker was simply explaining his own policies. A little later we find the next stage. The great Hengham had gone, but his successors remembered his words. When counsel suggested a particular construction of a statute, Shareshulle, J., replied that when he was at the bar he had used the same argument, and Herle, J., had informed him that Hengham, who had made the statute, read it another way. Again, in a remarkable case involving the Statute *De Donis*, Chief Justice Bereford used these remarkable words:

> "He that made the statute meant to bind the issue in fee tail, as well as the feoffees, until the tail had reached the fourth degree, and it was only through negligence that he omitted to insert express words to that effect in the statute; therefore we shall not abate this writ."

In short there is a tradition among the judges as to the intention of the principal statutes.[1] Finally, as we approach the middle of the fourteenth century, the judges have separated from the Council to such an extent that they treat legislation as the product of an alien body, of which they know nothing save from the words of the statute itself, and from that wording alone can they infer its intention—and with the rise of this idea we reach the modern point of view.

One more question remains for consideration. From time to time the theory has been propounded that a statute might actually be invalid because it contravened some fundamental principle or law. It has recently been suggested that this was, in fact, mediaeval theory and practice.[2] This position, however, becomes

[1] The above cases are more fully discussed in Plucknett, *Statutes and Their Interpretation*, 49–56.

[2] McIlwain, *High Court of Parliament* (1910); McIlwain, *Magna Carta and Common Law* (Magna Carta Commemoration Essays); McIlwain, *American Revolution* (1924). For criticisms see Plucknett, *Statutes and Their*

difficult to maintain after a detailed examination of the authorities. Of course, there is no doubt that the mediæval mind would never think of postulating the absolute sovereignty of Parliament or State. The whole scheme of things in the middle ages was based upon the assumption that municipal law derived its force from divine law; but we do not find in mediæval English cases any decisions which clearly hold that a statute is void because it contravenes some fundamental principle. On the contrary, the *Year Books* are very well aware that statutes were constantly making new law and abrogating old law, and their consciousness of the fact of radical legislation is therefore apparent. A similar claim has been made in favor of *Magna Carta,* but here again it is clear that *Magna Carta* itself has been amended and in part repealed, even during the middle ages. A practical limitation upon the legislature was of course the competing jurisdiction of the Church, and it was universally admitted during the middle ages that an act of Parliament could not operate within the sphere of the Church—a restriction in every way analogous to the inability of Parliament to legislate for a foreign country, for Church and State were two independent sovereign powers, each independent in its own sphere, in just the same way as two nations exercise sovereignty within their respective frontiers. It was in the early seventeenth century that the idea of a fundamental law begins to appear for the first time as a practical principle in the law courts under the influence of Coke. As we have already remarked,[1] he hoped to subject both Crown and Parliament to a paramount common law, and for a time we find some decisions[2] which accept this theory. In the eighteenth century, however, the principle is quietly abandoned—not so much because the mediæval authority for it adduced by Coke is unconvincing as because subsequent events had proved that there were no legal limitations upon the powers of Parliament. The establishment of the Reformation settlement and of new forms of religion, changes in the succession to the Crown, and extremely

Interpretation, 26 31; Plucknett, *Bonham's Case and Judicial Review* (40 Harvard Law Review, 30-70); Holdsworth, *Sources and Literature*, 41-43; Allen, *Law in the Making*, 250-257.

[1] Above, pp. 50, 51.

[2] *Bonham's Case* (1610) 8 Rep. 118; *City of London* v. *Wood* (1701) 12 Mod. 669 (both in Pound and Plucknett, *Readings*, 33, 34).

radical legislation (much of it in the reign of Henry VIII), had now convinced lawyers, in their own picturesque phrase, that Parliament could do anything except make a man a woman.[1] If the theory disappeared in England it bore fruit elsewhere, and the deep attention with which Coke's writings were read in America had something to do with preparing the way for the system of judicial review as it exists in this country.

[1] *Cf. Lee* v. *Bude, etc., Ry.* (1871), L. R., 6 C. P. 576 (in Pound and Plucknett, *Readings*, 34).

CHAPTER IV

THE PRINCIPLE OF PRECEDENT

The common law itself in its ultimate origin was the custom of the King's courts; the regular routine which they developed in the administration of justice became settled and known, and therefore served as the basis upon which people could forecast with some certainty the future decisions of the courts. The growth of such a custom depends to some extent upon the habit of following precedents, although it is more than likely that this development took place quite unconsciously. From earliest times, therefore, the royal courts have always had some sort of regard for previous decisions, although at first, no doubt, this was based upon a desire to save trouble. There was no need to consider a question *de novo* if it had recently been decided; and the whole principle underlying the Court of Common Pleas, which, as we have seen, was a court of limited and delegated jurisdiction, must have encouraged it to develop a routine in handling its business. This does not mean that there was anything in the twelfth century even faintly resembling the modern principle of precedent; there was merely a tendency to establish a procedure, and perhaps to adopt a few substantive principles which, taken together, constituted the custom of the court.

The Court of Common Pleas was about eighty years old when Bracton was engaged upon his treatise, and as every historian has observed, that treatise is distinguished by its extensive use of cases. A few words must therefore be said upon the use which Bracton made of the material which he collected in his famous *Note Book*. There has been a tendency to compare his use of cases with that which later prevailed in the classical common law. We venture to suggest that a contrast would be more useful than a comparison. The very first page of Bracton's treatise[1] throws remarkable light upon his point of view. He asserts that the present bench is much inferior to its predecessors; foolish and

[1] Translated in Pound and Plucknett, *Readings*, 127.

ignorant judges, who have mounted the judgment seat before they have learnt the law, have corrupted its doctrine; they decide cases by fancy rather than by rule. And so Bracton, using words which would sound presumptuous in any lesser man, announces his intention of instructing the younger generation in the principles of the law by writing this treatise which he solemnly commends to perpetual memory. Bracton's book, therefore, is an attempt to bring back the law to its ancient principles, and the attempt is made by one whose official position was no doubt impressive, but who was still more conscious of his own intellectual powers and of his mission in restoring the law. In this same sentence he tells us that he looks largely to the decisions of a previous generation of upright judges together with their private opinions—and the two thick volumes of his *Note Book* justify his claim that he collected them diligently and laboriously. His intention, therefore, is to use cases. But it must be observed that whatever use he made of these cases was necessarily peculiar to himself. He alone of all the lawyers in England sought and obtained access to the Plea Rolls; he used the originals, and there were no copies until he made one for his own convenience, containing the cases which he selected. None of his contemporaries attempted such a thing. Bracton clearly was the only lawyer of his day who chose to exert a good deal of court influence in order to obtain the loan of numerous Plea Rolls, and who was ready to devote immense pains and labor in searching hundredweights of manuscript and having his discoveries copied in a very substantial volume. Clearly, then, we have no right to assume that Bracton's use of case law was any part of contemporary legal thought. On the contrary, it is clear that he was undertaking research into the present and former condition of the law by a novel method which he had devised, namely, the search of Plea Rolls, which was a new discovery in his day. Any use of cases on Bracton's lines by the profession at large, or even by the bench alone, would have been manifestly impossible. The Plea Rolls are immense in number and there was and still is no guide to their contents; they have to be read straight through from beginning to end without any assistance from indexes or headnotes.

Bracton, therefore, had discovered a new instrument of research, and owing to his fortunate official position he was

enabled to use it. If we examine the use which he actually made of the cases he discovered, it will be clear at once that he was not actuated by any of the modern ideas of case law. Many of the cases he uses are quite old, and he admits that many of them are not law to-day. But the whole of his argument is that his contemporaries have perverted the law, and that the recent cases are bad ones while the old cases were good—intrinsically good, that is to say, as embodying sound principle. In other words, Bracton has no hesitation in using cases which we should call out of date or overruled, in order to maintain that the law ought to be something different from what it is. From this it is clear that the whole of Bracton's position would fall if decisions, as such, were in any modern sense a source of law. Under any such theory if decisions were authoritative a choice would have to be made between contradictory decisions, and so a theory of case law would have to be devised. It is the very absence of such a theory which enabled Bracton to carry out his plan, and that plan seems to have been to state in logical order a series of legal propositions, and then to illustrate their working from cases. Bracton first states his principles and then adduces his cases as historical evidence of the accuracy of his statements. This is a vastly different method from taking the cases first and deducing rules of law from them. Bracton's whole purpose is to reconstruct, and, if possible, to revive the law of nearly a generation ago; he would put the clock back and restore the court's custom as it used to be in its best period, and it is as evidence of that custom that he uses his cases. We are therefore entitled to say that in Bracton's hands a case may illustrate a legal principle, and the enrollment may be historical proof that that principle was once applied, but the case is not in itself a source of law.

This does not mean that Bracton's novel method of studying law was without effect; we have already suggested that his use of cases may have interested his contemporaries and the succeeding generation, and it may be that it prompted other lawyers to collect records of cases when they had the opportunity.[1] Indirectly, therefore, Bracton's influence may have something to do with the rise of the *Year Books*. Access to the Plea Rolls was still almost impossible to obtain, and so, instead, reports were

[1] Above, p. 181.

circulated of discussions in court as the next best thing—and with the growth of scientific pleading these reports were superior for practical purposes to the plain transcript of the record which Bracton used, for the reports give the discussions and the reasons for the matters which appeared upon the record. Of the *Year Books* we have already spoken; they cover several centuries and copies are fairly numerous; but were they used for the same purposes as a modern law report? There seems no doubt that they were not. There are quite frequent cases in the *Year Books* where we find judges or counsel mentioning previous decisions. They seem generally to quote from memory; sometimes they give us the names of the parties, but not always. Occasionally such a citation is answered by a denial that the situation is the same; more rarely it will be retorted that the case cited is bad law; a little more frequently the court will indicate that whatever the older case may say, the court does not intend to apply that principle.[1] In short, the citation of a case in point may perhaps be persuasive enough for counsel to think it worth while, but it is certainly not in the least degree binding.

And yet on the other hand when a novel or important point is raised the court is fully conscious that its decisions may start a stream of other decisions in a particular direction. In an early *Year Book* we find counsel reminding the bench "that the judgment to be given by you will be hereafter an authority in every *quare non admisit* in England,"[2] but, as Professor Winfield remarks,—

> "this contention does not go beyond insisting that the judges are expected to keep the law unchanged *in pari materia*. It falls very far short of arguing that in later cases on writs of *quare non admisit* this case will be cited to them and that they will have to follow it."[3]

Still, it would be rash to say that there was no conscious judicial legislation in the *Year Book* period; in 1305 Hengham ordered a party to use a particular procedure, adding "and consider this henceforth as a general rule." In 1310 Chief Justice Bereford observed that "by a decision on this avowry we shall make a law throughout all the land." He certainly did not mean that the

1 Numerous examples will be found in Winfield, *Chief Sources*, 149–152; Allen, *Law in the Making*, 126–136.

2 Translated in Pound and Plucknett, *Readings*, 128.

3 Winfield, *Chief Sources*, 149.

Year Book report of this case would be quoted as authoritative in later cases, for we are still clearly in the period when the common law was primarily the custom of the King's Court; the decision of an important point after due deliberation added one more element to the mass of custom which the King's Court applied—and, as we have already seen, the remarkable feature about custom was the ease with which it grew up and the facility with which it could be changed. Even such striking words as those we have just quoted cannot be properly interpreted as evidence of the existence of a system of case law. Even in the later *Year Books* down to the fifteenth century the same observation holds true; the *Year Books* themselves (of which there were a goodly number by this time) were not regarded as collections of authoritative or binding decisions. The nearest resemblance to such a notion is to be found in some remarkable words of Chief Justice Prisot in 1454. In spite of three large folios of discussion Prisot maintained that the matter was clear:

"If we have to pay attention to the opinions of one or two judges which are contradictory to many other judgments by many honorable judges in the opposite sense, it would be a strange situation, considering that those judges who adjudged the matter in ancient times were nearer to the making of the statute than we are, and had more knowledge of it. . . . And moreover if this plea were now adjudged bad, as you maintain, it would assuredly be a bad example to the young apprentices who study the *Year Books,* for they would never have confidence in their books if now we were to adjudge the contrary of what has been so often adjudged in the *Books.*" [1]

Clearly there is the faint beginning of a more modern spirit in these words; the Chief Justice is seeking for the contemporaneous exposition of the statute in question and maintains that there is a balance of authority in favor of his view. His objection to going against that authority is that it would be "strange"—a common expression in the *Year Books* for "inconsistent." He would strike a balance between "some opinion of some judge or two" and many judgments by several honorable judges; but even then the result is not the discovery of an authentic binding precedent.[2] The thought of a decision against such a weight of

[1] *Y. B. 33 Hen. VI,* Michs. 17, fo. 41.

[2] It resembles much more closely the weighing of authorities in Roman and canon law.

authority shocks him chiefly because it will confuse law students and shake their confidence in their books; which perhaps is another way of saying that even a mere student in reading the case would detect its inconsistency with established principle, and would perhaps hardly credit what he read. This perhaps is the meaning of some other passages in the *Year Books* where the court finds it salutary to look at a proposition from the point of view of the law student; Bereford explained his decisions "for the sake of the young men who are present," and down to the eighteenth century judges in court would bear in mind the fact that a judgment might be expanded into a lecture for the law students who were present.[1] Clearly, students studied their law in court and also in the *Year Books,* and as late as 1454 an awkward decision in the *Year Books* will be criticized (as we have seen) because it is confusing to students. But the most significant part of Prisot's remarks lies in the fact that he regards even the decisions of many honorable judges as only persuasive; neither he nor the other lawyers who argued on the case regarded themselves as bound by any of the decisions mentioned.

When we come to the sixteenth century we get a little nearer the modern point of view, although even such a reporter as Dyer thought it worth while to report what the judge said privately and what was said in mock trials in Lincoln's Inn.[2] If he uses the word "precedent" in 1557 (which Mr. Allen thinks is the first occurrence of the word) it is to tell us that in spite of two precedents the court adjudged the contrary. At about the same time there is a passage in Plowden wherein it is stated "that the records of every court are the most effectual proofs of the law in relation to the things treated of in the same court;"[3] but the examples which he gives are all matters of criminal law, and it is well known that the Crown frequently had its records searched where royal interests were involved—as they were in matters of treason and felony. There is no indication that in Plowden's day anyone save a Crown lawyer would be allowed to search Plea Rolls for precedents. It is when we come to the

1 "Lord Mansfield delivered the opinion of the court, having first desired Mr. Hussey to state the case for the sake of the students."—*R.* v. *Peters* (1758), 1 Burr. 568.

2 1 Dyer, 14, 111; both in Pound and Plucknett, *Readings*, 129, 130.

3 Cited in Allen, *Law in the Making*, 137.

time of Coke that we find the citation of precedents particularly common, and after the Restoration we find a few rules judicially laid down to govern their use. In 1670 Chief Justice Vaughan distinguished *dicta* from those parts of the judgment which form an integral part of it, although he admits that if a judge believes a previous case in another court to be erroneous he is not bound to follow it.[1] A hundred years later Blackstone was not able to add very much to this;[2] it is only in the nineteenth century that the present system of case law with its hierarchy of authorities was established.[3]

[1] *Bole* v. *Horton* (1670), Vaughan, 360, 382 (extract in Pound and Plucknett, *Readings*, 131).

[2] 1 Bl. Com. 69–72 (Pound and Plucknett, *Readings*, 269–271).

[3] See the material from the nineteenth century in Pound and Plucknett, *Readings*, 132–134, 272–295.

BOOK TWO
SPECIAL PART

PART I

REAL PROPERTY

CHAPTER I

FEUDALISM

It is universally admitted that the great historical feature of our law of real property is its feudal character, and that in order to understand the reasons which brought about a good many doctrines of real property law it is necessary to regard the matter from the feudal point of view. Something, therefore, must be said as to the origin and characteristics of feudalism.

If we had to sum up the social characteristics of the present age in one word, that word would probably be "capitalism." If, on the other hand, we wish to describe the early middle ages in a similar way, we shall have to say that they were feudal. "Feudalism," in fact, is merely a vague and general word describing the social structure of Western Europe from the tenth century onwards. It is beyond doubt that the word "feudalism" is just as vague and occasionally inaccurate as is the word "capitalism." Society at the present day contains a number of different characteristics, some of them being inconsistent with a complete capitalism. When we speak of the present age as capitalistic it is perfectly easy to make all the obvious exceptions which are necessary in order to make the statement approximately true. There is no difficulty in doing this because we are perfectly familiar with the conditions of our own age. When we come to mediæval times, however, the same problem arises in a more difficult form. At no time were the middle ages completely and

consistently feudal, any more than our own age is thoroughly capitalistic. The difficulty, of course, is to trace the exceptions to the more general feudalism in view of our unfamiliarity with mediæval conditions. It must be constantly remembered, therefore, that "feudalism" is a vague word of modern origin which was completely unknown in the ages to which we apply it, and that it is nothing more than a rough generalization upon the character of mediæval society. It must likewise be remembered that mediæval society varied considerably in different years and in different places, and that it is very difficult to find a state which continued for an appreciable length of time under strictly feudal conditions.

There are a few characteristics which remain fairly constant through the feudal age, and which may be regarded as typically feudal. In the first place a prominent feature of it is the relationship of the lord and man. In its personal aspect this was felt to be a solemn and sacred bond; it was accompanied by an impressive ceremony called homage, and once that ceremony was performed it was hardly possible to dissolve the relationship. The obligations of mutual aid and support which grew out of it may perhaps owe their sacred character to the fact that they were so absolutely necessary to the preservation of society at the time when the institution arose. With a small and scattered populace, organization became difficult, especially with the absence of all the modern mechanical devices which have made the power of the State paramount. Where a modern nation in a week or two can mobilize an army of millions of conscripts, the feudal age had to rely upon the relationship of homage to secure the attendance of its military forces. Society depended to a very great degree upon the fulfilment of the obligations arising out of homage, and therefore surrounded the ceremony with every available religious and social sanction. Even then under some circumstances a vassal could dissolve the relationship binding him to his lord if he gave proper notice in a form which was technically called "defiance." The feudal relation of lord and man was therefore on its practical side decidedly weak; it was only while the religious and social sanctity attaching to homage endured that a lord could have any reasonable dependence upon the assistance of his vassals. Where so much hung upon the good faith of

undertenants it is only natural that the power of the State should be very weak.

The relationship of lord and man was most usually accompanied by a peculiarity in the law of land. In the days when feudalism was at its height, the vassal held his land of the lord. Originally the vassal's interest was not large. He might forfeit his land for any great breach of the homage-relationship such as was described by the shameful word "felony;" in any case his interest was only for life, and whether the lord re-granted the land after the tenant's death to any of his descendants or kindred was a matter which rested in the lord's discretion. It will therefore be seen that feudalism implied land holding rather than land owning, save in the case of those few great lords and princes who had no superior, and therefore owned their lands, both those they retained and those which they granted out, by absolute right.

A third characteristic of feudalism was the fact that to the combination of these two relationships of lord and man, landlord and tenant, was added a system of military organization. The vassal who held land of his lord was bound by his tenure to provide a certain amount of military assistance, and for this purpose the land was organized into units, each one of which was charged with the provision of a certain number of knights armed and mounted and attended by the requisite number of subsidiary arms in squires and sergeants. This system of military service lasted as long as the knight himself continued to be the basis of military organization. As time went on the knight, who at first had been an extremely mobile unit, gradually became more cumbersome. His growing social importance necessitated measures for his protection, and these took the form of heavy armament both for the horse and his rider. This reduced his mobility, and when in the end the long bow was invented the knight ceased to be of practical importance in warfare. Nevertheless, the organization of the land into knight's fees and the exaction of military service still survived, together with many other elements of feudalism. Consequently we have in the later middle ages the perpetuation for legal and fiscal purposes of a feudalism which had long since ceased to represent current conditions. In England the military side of feudalism was in constant operation until it was abolished in 1660, four hundred years after it had ceased to be the working

foundation of the military system. Other aspects of feudalism, such as dependent tenure, have never been abolished in England, and are presumed to exist still in some jurisdictions in this country.

Feudalism arose largely out of military necessity and was a measure to cope with a grave military situation—the invasion of Europe by the Norse. Consequently in all fields of life the military expert was predominant, and for a time even overshadowed his great mediæval rival, the religious expert. Between the two of them, the military and the clergy, there was little room for anything else. So grave was the crisis that populations willingly (and wisely) accepted the domination of the knights and the clergy as the only means of saving Europe and its culture from barbarian invaders, and both of them did their duty. But the social consequences of this were serious and showed how high a price had to be paid for such precarious security as feudalism could afford. Towns and city life were hard put to it to find a place in the feudal system, while the peasantry had no alternative but to accept serfdom.

Finally, all these elements so combined that they served the place of public law and a constitution. The defense of Europe had to be carried out throughout the length of its coast line at very widely scattered points; there were no railways and no telegraphs. It would therefore have been impossible for a government in Paris, for example, to defend France from attacks which might take place at any point upon the Channel, the Atlantic or the Mediterranean. It was therefore necessary to go to extreme lengths of decentralization, and so we find another element of feudalism which consists in allowing each lord to assume governmental powers over his tenants. Whatever military defence is undertaken must be carried out by local forces organized and led by local leaders, and consequently it is necessary that those leaders should exercise powers of government within their locality. The tenant, therefore, owes to his lord fidelity, military service and counsel (which is expressed as an obligation to attend his lord whenever summoned, whether it be for services in the field or at the council table), and is subject to his lord's jurisdiction. And so the dogma will arise that every lord can hold a court for his tenants, compel their presence in it, and do justice to them in matters arising within the fee.

It will therefore be seen that the feudal age denied a good many things which in our own day are taken for granted. Feudalism implies the absence of anything corresponding to the State: each lord has jurisdiction over his tenants, and they in turn over their undertenants, and allegiance is owed to the lord to whom homage has been done. So, too, property in land as we know it to-day is inconsistent with thoroughly feudal conditions; while even the waging of war was not a national concern but was left to be the occupation of those whose tenure obliged them to undertake it.

All these characteristics of feudalism which we have described in general terms are subject to infinite variation in every quarter of Europe, and although we, at a distance of nearly a thousand years, can survey them all together as aspects of one social structure which we call feudalism, yet it must be remembered that to contemporaries it may very well have been the diversity rather than the unity which seemed most striking. The word "feudalism," once again, is a modern generalization about mediæval society.

A few indications may be given concerning the origins of feudalism, especially on the continent, for English conditions were apt to reproduce, and even to imitate, society abroad. Although some of the main lines of development which finally produced feudalism have now become fairly established, there still remains a great deal of controversy upon innumerable points, and upon the relative influence which different institutions had in the development of the final product. Feudalism, in fact, is not only the sum-total of a number of different institutions existing at the same time, all of which contributed to promote the same end, namely, the government and defence of the land, but it is also the product of many different lines of development, some of them coming from widely separated places, which have converged and finally given rise to the state of society called feudalism.

There is, for example, the *comitatus* of which we first hear in Cæsar and in Tacitus, both of whom describe the Germanic tribes as having a social custom whereby a great chief would surround himself with a band of chosen warriors and enter into a close personal bond with them. They formed a fraternity for military adventure and seem to have lived upon the spoils of war. The

comitatus steadily increased in importance, and when finally many of the barbarians peacefully settled within the Roman Empire, they found there a Roman institution of somewhat similar character whereby a general or an Emperor would engage a band of soldiers (often barbarians) for his personal service, such soldiers being called *bucellarii;* it seems that the general provided a military outfit for each of the men, which reverted to him after their death. In the history of the fifth and sixth centuries we find a great deal about the doings of such bands of warriors. The points of contact with later feudalism seem to be the performance of a ceremonial oath of fidelity, and the obligation, upon the man's death, to give or return to his lord a varying amount of military equipment. It is fairly clear that a similar institution existed in England, where we read of thegns and gesiths. With the gradual settlement of society both the chief and his train became more fixed; the chief became something like a provincial governor and his followers then settled down with him and became his household and official staff. In France there was such a class of court officials called *sejones,* and in England, especially under the Danish kings, we find a group of "huscarls" who not only fought around King Harold as his bodyguard, but had also been sent around the country as administrative officials to collect taxes. Later still these officials tended to leave the court and settle in the country, supporting themselves upon grants of land from the King, who, however, still obliged them to serve him upon demand.

Another line of development which finally mingled with the former was that of patronage—and here we have not a Germanic, but a Roman, institution. Its general outline somewhat resembled the *comitatus,* except that it never had the marked military character of the Germanic institution. Patronage had a long history under the Republic and later under the Empire. As early as the year 122 it had become in some cases hereditary, but this, of course, was merely a matter of custom; patronage was no part of Roman law and was not an element of the political constitution, although it was a most powerful social institution. Many patrons had hundreds of clients, and here again we find the word "faith" closely connected with the relationship. Quite frequently a whole town would put itself in the faith of one person, such clients

being described as commending themselves to their patron, the significance of which seems to have been that the client delivered himself over to the patron relying upon the patron's faith.[1] There were several ranks among clients and their principal obligation seems to have been to give service and counsel to their chief — in plainer words, they acted very much like a political machine. The patron in turn defended his clients in litigation, and we may easily imagine that the support of a powerful patron was a great advantage. In the Theodosian code (438) we find an attempt to prevent clients commending their lands as well as themselves; but it is equally clear that this attempt was unsuccessful and that nothing could prevent the spread of the practice of patrons getting control over the land as well as the persons of their clients. It would seem that this development was prompted by the rigors of the taxation system. The one sphere of government in which Rome was inefficient was that of taxation, and this defect contributed very largely to the disintegration of Roman society. The taxation fell heaviest on the smaller propertied class and their inability to support the burden eventually depressed that class into the condition of dependent tenants. The practice of commending land as well as oneself to a patron was an important step in this direction. At first it was merely a device whereby the patron assumed responsibility towards the State for taxes due, in return spreading the burden of taxation more evenly for the client. We also find patronage transferred to France, where it is clear that the French patronage is a direct descendant from the Roman. In France it frequently took the name of a "trust." By this time the Church had acquired extremely wide property in land, and bishops and abbots were among the most powerful people in the country, and consequently we find a good deal of commendation to great ecclesiastics.

An important part in this development was played by a legal institution called the *precarium* which we must now consider. The *precarium* has a very long history in Rome, where it was closely associated with patronage, although for a long time the law took no notice of it save to attempt to abolish it. Roman

1 Contrast the *comitatus* and feudal custom, where the lord demanded faith from the man.

lawyers had made certain categories into which property interests could be divided; there were ownership, possession, and usufruct. But the *precarium* could not be placed under any of these heads. Our first legal definition of it is by Ulpian at the beginning of the third century, who says that "a *precarium* is granted to a petitioner in answer to his prayers, and for his use." It is the prayer or petition which is the characteristic of the *precarium*. The recipient gets the land as an outcome of his urgent petition. The characteristics of the *precarium* were therefore that it conveyed only the enjoyment of the property. The arrangement was terminated by the death of either party, the grantor (*rogatus*) or grantee (*rogans*). More than that, it was technically an act of charity and could therefore be revoked at any moment. Its legal position was anomalous; in one respect it was superior to the lease, for it conferred possession, but in others it was inferior, since it was not based upon contract. Gradually the praetor protected the *precarium* against third parties, although, of course, not against the *rogatus*. This arrangement was frequently used by embarrassed debtors who would surrender their lands to their creditor and receive them back as a *precarium*, for in this way the debtor was assured of his immediate future while the creditor in the end received a good deal more than the original debt.

The combination of patronage and the system of *precaria* was inevitable, and the two together played a large part in the establishment of the *latifundia* or immense landed estates worked finally by slave labor, if at all. The use of *precaria* persisted with increasing influence; late in the fifth century we find it described by Salvianus, who observes that it is revocable at will, that it confers a tenancy and not ownership, that the tenant owes gratitude to the donor, being bound to him in good faith, and that the breach of this faith will make him *ingratissimus* and *infidelissimus*—two of the most serious reproaches which could be made. In the sixth century it is clear that the Church is a lavish grantor of *precaria*, and so the *precarium* passes to France and mingles with the general stream of influences which were finally to create feudal society.

This brings us to the deliberate attempt made by the French monarchs to remodel these institutions. The sixth and seventh centuries are occupied in French history by the Merovingian

dynasty, which made a great attempt to establish a national government under almost impossible conditions. Their great difficulty was that of finance, for the Roman system of taxation was now unworkable and the Crown domain was fast becoming exhausted by the number of grants which the Crown had to make to reward its faithful servants. The solution which the Merovingians found was only partially successful. They seem to have rewarded their public servants by grants of land to be held as *precaria* (without, however, abandoning altogether the old system of absolute alienation) and in this way they probably hoped to avoid the permanent depletion of their resources which must have resulted from grants in full ownership. These *precaria* were subject to forfeiture for treason or for failure to perform the services due, and in this respect the *precarium* closely resembles the Anglo-Saxon bookland. It is at this moment, too, that we find the *precarium* assume a new name, that of *beneficium* or benefice.

This policy was not drastic enough to rescue the Merovingian kings from their financial difficulties, and their increasing powerlessness finally prepared the way for a new royal house, the Carolingians, which developed from their own Mayors of the Palace. Under these vigorous statesmen the problem was attacked anew and at its center, the Church. At first it was proposed to confiscate ecclesiastical lands outright and grant them to royal nominees; or as an alternative wealthy monasteries might be compelled to support a certain number of soldiers, while we occasionally find that some lay official will be provided for by appointing him abbot of a monastery. These unseemly measures in the end gave way to a compromise reached by Pepin the Short in 751, according to which the Church granted lands to royal nominees to be held as *precaria*, owing services to the Crown and a very moderate rent to the Church. In this way we get the beginnings of the great distinction drawn by feudal lawyers on the continent between eminent domain and useful domain.

There were other forces, too, which were making the Church the overlord of land. A great deal of its wealth came not from the great nobles but from the much smaller landowners who hoped to atone for their crimes and win spiritual favors by surrendering to the Church free land and receiving it back by precarious tenure.

It will be noticed that by this time the *precarium,* instead of being sought, is rather offered, and so we get an institution whose name is really a contradiction in terms—the *precarium oblatum.* Churches would frequently have scattered estates some of them quite remote from the bulk of the Church's interests, and in order to secure a revenue from these outlying lands the *precarium* was used once again as a means of letting them to tenants who would work them and pay a moderate rent. All these different types of *precaria* are becoming popularly known as benefices.

To these developments was soon to be added the factor of military service. It would seem that before the middle of the eighth century military service had become an obligation of those *precaria* which had been instituted in response to the King's request. Charles the Great at the beginning of the ninth century had established the rule that all were liable to military service and not merely those who held of the Crown in chief, and consequently he had to make arrangements whereby the poorer men could join together in meeting the expenses of one of their number. By the end of the Carolingian period military service was becoming systematized, and early in the eleventh century the knight's fee appeared as a definite institution in Normandy. Indeed, the division of land into districts, each with an allotted quota of men and material, is a simple and obvious device; we find for example in 1679 that an act in Virginia required each district to provide one man armed and mounted for service in the Indian wars.[1]

We have now to consider the connection between land holding and jurisdiction. The factors which made for this development were to be found in both German and Roman institutions. Under Germanic custom every freeman had jurisdiction over his household, and this jurisdiction frequently took the form of holding him responsible for certain police measures. At the same time there was a tendency for large landed estates to be organized as separate concerns by their owners with little or no reference to the ordinary public jurisdiction; a striking example of this is the persistence of the ancient demesne of the Crown in England, which for some centuries held a position outside of the common law. On the Roman side there were even stronger tendencies in

[1] 2 Virginia, Statutes at Large, 434, 435.

this direction. In the fifth and sixth centuries we find immunities granted to landowners, sometimes including an exemption from the visits of imperial justices, while at the same time the frequent grants of the profit of jurisdiction naturally led to the exercise of that jurisdiction by the grantee in an endeavor to make the most of his profits.

In Germany it seems clear that there were two different types of feudal court each of which had its special history. Of these one was based directly upon the relationship between lord and vassal, while the other seems to have been originally a communal court which later fell under the control of some neighboring landowner. It has recently been suggested[1] that the rise of feudal jurisdiction in France followed rather different lines, and that these two types of feudal court are not at first distinguished. The question therefore arises as to whether the origin of French feudal jurisdiction must be sought in the relationship of lord and vassal or in the appropriation of once public courts by private owners. There is reason to believe that French feudal jurisdiction did in fact derive from the old public courts, and in some cases it has been possible to trace the stages by which the transition was made. The Frankish equivalent for the county court was the *mallus*, in which, as in our own communal courts, judgment was given by suitors (often called *échevins*) who very frequently were obliged to fulfil this office because they were the holders of particular pieces of land. The office of these *échevins*, therefore, became hereditary in many cases. It has been shown, however, that the *mallus* at times begins to consider cases which are really feudal in character while simultaneously the *échevins* become rarer and finally disappear, for their duties must have been very burdensome and their attendance at court difficult to enforce. The count, on the other hand, had his band of vassals who were bound to attend him on demand, and so it is only natural that when the count discovered that it was difficult to secure *échevins* he should use his feudal connections and compel his vassals to take their place. In this way an old public court will become a private feudal jurisdiction.

1 Ganshof, *Contribution a l'Étude des Origines des Cours Féodales*, Revue Historique de Droit (1928), 644.

CHAPTER II

FEUDALISM IN ENGLAND

These, then, were the general features of feudal development on the continent, subject, it will be understood, to an infinite variety in detail as one passes from district to district. Life was as varied then as now, perhaps a little more so, and every local territory pursued its own history and followed its own destiny in accordance with conditions which in many cases must have been local and peculiar, although in the end the result was apt to be roughly analogous to that which had been reached by many other communities in different parts of Europe. In raising the question how far all this history of European feudalism applies to England there are many difficulties. Our sources seem somewhat less informative than those on the continent, and although the general outlines of feudal development in England can be traced, much of the detail must be left to conjecture. A good deal can be ascribed to conscious imitation, for English kings were naturally tempted to look for their model to the continent where the new type of organization was more advanced. In general terms it may be confidently stated that the Anglo-Saxon monarchs had already developed before the Norman Conquest the principle features of feudalism, although the means by which this development took place are not always apparent. On the eve of the Conquest we find a good deal of dependent land tenure which was subject to rents and services, and even to military service as well. The Anglo-Saxon bookland may in its earlier days have been a grant of full ownership, but in the later period it resembles more closely the continental benefice in spite of the fact that its history was somewhat different. The Anglo-Saxon sources also tell us about "laen land" which seems halfway between the benefice and a lease for three lives. Private and personal jurisdiction played a prominent part in the police system; lordless men were compelled to find a lord. At the same time immunities of varying extent were lavished upon the Church and later upon laymen, and by the end of the period it seems

to be assumed that landowning involves some elements of lordship. The old hundred court not infrequently fell into private hands and it is to be presumed (at least in law) that this was in consequence of a royal grant. The origins of the greater jurisdictions can in many cases be traced, but the great mystery in Anglo Saxon institutions is the development of the small private franchise. Upon this we have very little light at all.[1]

The effect of the Norman Conquest in England was to introduce a body of administrators who were familiar with the more highly organized type of feudal society existing on the continent, and the result of their presence must have been to give a definite form to institutions which in England were thus far somewhat vague. From this point of view *Domesday Book* must be regarded as an attempt by those administrators to express English conditions in the technical terminology of continental feudalism. It may be said perhaps that although the Norman Conquest did not introduce feudalism into England, yet it may very well have largely contributed to the development of a feudal system in England, for there can be no doubt that as far as the law of land is concerned England was the more thoroughly and consistently feudal of all the European states.

When we come to examine the Anglo-Saxon law of land we find three terms in use, "bookland," "folkland" and "laen land." Of these bookland is by far the most frequently mentioned in the sources, and necessarily so, for bookland is peculiar in being held by a written document. Many documents constituting bookland are to be found in the large collections of Anglo-Saxon charters which still survive. Even in the form of the document we can see continental and Roman influence; the wording of the charters is frequently florid and full of religious and moral commonplaces, which seems to show that these documents were not yet in ordinary everyday use; it is upon exceptional and solemn occasions that a charter has to be drawn up, and the grantee (who normally seems to have been the draftsman) lavished his literary skill upon a charter which was to be the symbol of exceptional privileges. During most of the Anglo Saxon age the grantees of these charters are almost always churches, and it is therefore to be expected

1 See Corbett in 3 *C. Med. H.* 405–408 (extracts in Pound and Plucknett, *Readings*, 50, 51).

that continental influences should play their part. In spite of their length it is not always clear exactly what an Anglo-Saxon charter purports to convey. It will say with a great deal of precise Roman terminology that it conveys the ownership of land, but this very term is not free from ambiguity. In many cases it is clear that what passes under the charter is not land but rather rights and privileges over land which is in fact occupied by others. Such rights consist of tributes or farms payable to the lord; then, too, there are various immunities which will exempt the grantee from nearly all public burdens (especially a heavy liability to purveyance)—and it seems that these rights over freemen were numerous and profitable; to them must be added forest and hunting rights, together with the profits of jurisdiction —and as Anglo-Saxon law exacted money payments for all sorts of faults, trivial or grave, the profits of jurisdiction must have been considerable. This does not mean that property in land (as distinguished from jurisdiction over other people's land) could not be conveyed by charter; no doubt it was, but the significant feature is that the same form serves for both purposes. This feature long survived, and even in the classical common law the same form of words will pass a piece of land, or a manor, which is not entirely land, or an honor, which is not land at all but merely feudal jurisdiction over land.

When we come to the later bookland we find that it is no longer peculiarly ecclesiastical. Laymen seem pleased to obtain it on account of certain legal advantages, notably devisability, which seems to have been a characteristic which the Church at first valued highly, since bookland could be left by will, and so one bishop was able to provide for his successor, for as yet prelates did not have perpetual succession.

A word must be said about folkland. The word only occurs three times in the whole of Anglo-Saxon legal literature, but nevertheless a vast edifice of supposition and conjecture has been built upon it. It has been alleged that folkland was the public property of the State, and so the Anglo-Saxon nation has been credited with vast possessions in its own right, completely distinct from the property of the kings. This theory was demolished by Sir Paul Vinogradoff who established that the meaning of folkland is simply land which is held according to customary law

by folk right, which therefore constitutes its great contrast to bookland.[1] As Maitland has said:

"Land, it would seem, is either bookland or folkland. Bookland is land held by book, by a royal and ecclesiastical *privilegium*. Folkland is land held without book, by unwritten title, by the folk-law. 'Folkland' is the term which modern historians have rejected in favour of the outlandish *alod*. The holder of folkland is a free landowner, though at an early date the King discovers that over him and his land there exists an alienable superiority. Partly by alienations of this superiority, partly perhaps by gifts of land of which the King is himself the owner, bookland is created." [2]

As for laen land, we have here perhaps the closest English analogy to the continental *precarium*. We even find some curiously close parallels between the position of the Church in England and its position on the continent; thus, we find the Church being called upon by the English kings to grant laen land to royal nominees. One of the great difficulties in studying this laen land is the confusion which often exists between the laen (which strictly should be nothing more than a loan) and an absolute gift; "the loan is a gift for a time."[3] Then, again, although laen land is sometimes constituted by written charter yet it is perfectly clear that a good many grants must have been made without charter. In a few cases where we find the incidents of laen land set out the similarities with later feudalism are most striking. Thus we find that the tenants are bound to ride upon the lord's errands, transport his goods, pay rent, and perhaps fight. Then, too, laen land is within limits inheritable. The limit seems to have been for three lives,[4] each of the two inheritors paying relief. Under normal circumstances the three generations would cover a period of about eighty years, but it is not at all clear how the Church proposed to secure its reversion after so long a period. Indeed, it is known that the Church of Worcester had a good deal of trouble in this matter, and there is certainly a very strong tendency for such land to become perpetually inheritable, although subject to relief. We even find in the year 983 an indication that the widow of a tenant of laen land may

1 1 Vinogradoff, *Collected Papers*, 91, 92.
2 Maitland, *Domesday Book and Beyond*, 257.
3 Maitland, *Domesday Book and Beyond*, 299.
4 This may be a reminiscence of Justinian, Nov. VII, 3.

have to marry one of the lord's subjects, and in the days of Edward the Confessor this has grown into the right of granting an heiress and her lands to the nominee of the lord. If laen land were at all common in England it would seem that we had in it the most remarkable link between English and continental feudalism; but unfortunately the chances of time have only left us documents in any considerable quantity from one church, the Cathedral of Worcester, and it is uncertain how far they represent conditions generally throughout the country, and how much they owe to the originality of the great Bishop Oswald who ruled the see towards the close of the tenth century.

CHAPTER III

INHERITANCE

Numerous attempts have been made to discover the origin of property in land, but unfortunately they have in many cases been prompted by political or economic prepossessions, with the result that the discussions upon this subject are by no means always good examples of scientific research. The age-long instinct of the human race which would imagine an ideal state of perfection in some remote age of the past has been very influential in directing men's studies to the early history of property. In the earlier part of the nineteenth century a school of German historians, of whom von Maurer was one of the greatest, discovered something like an earthly paradise in the condition of the Germanic tribes in the days of Cæsar. They were even prepared to assert that as late as the seventh century the Germanic peoples practised communism in land, and that the idea of private property in land did not prevail among them until they had been corrupted by the influence of Roman law. The ancient Germanic village community from this point of view consisted of a highly socialistic state, very small, but very compact, which held the title to all the land in the community, allowing individuals only a right of user. This hypothesis is known as the mark system.[1] In 1887 a brilliant and searching criticism of this theory was made by one of the greatest of modern historians, Fustel de Coulanges, who demonstrated the falseness of this position. For some strange reason there has been great reluctance to accept the results of Fustel; by an unfortunate fate his disinterested scholarship became entangled either with party politics in France, or national historical tradition in Germany, with the result that it is only at the present moment that his work is beginning to receive the attention which it deserves.[2] The results, however,

[1] The theory is stated briefly in Stubbs, *Constitutional History* (1875), i. 49.

[2] Fustel de Coulanges, *Les Origines du Systeme Féodale* (1900); *Recherches sur Quelques Problèmes d'Histoire* (1913). For his life see Pierre Gaxette in the *Criterion*, 1928, 258, and for his work see Prof. de Blécourt's article on *Tijdschrift voor Rechtsgeschiedenis*, 1929, 150.

are beginning to be silently adopted even in Germany whose historians have long resisted his influence. The older English historians, notably Stubbs, accepted the mark system in its entirety until Maitland demonstrated in 1897 that it was inconsistent with the English documents. The results he reached are similar to those of Fustel de Coulanges although he differed from him on points of detail. Into the complicated controversy surrounding the village community we cannot enter.[1] The most we will say is that the English sources show us individual ownership which as time goes on steadily becomes more intense. There was, however, a great deal of co-operation between neighboring villagers, and then as now they would combine their resources in order to secure some particularly costly piece of agricultural equipment,—the team of oxen which drew the heavy plow, for example,—to arrange the rotation of crops and fallow, and other matters where united action was an advantage. This does not mean, of course, that there never was any communism in land at some remote period in England; but it does mean that we have no evidence of such a condition, and that as far as history is concerned the sources indicate individual ownership. The organization of the village community in prehistoric times is an investigation which cannot be handled by the methods of the historian, and the theories which have been suggested on the subject must be taken subject to the reservations necessarily applicable to speculations in pre-history.

There is some historical reason for believing that in early times land was owned by families rather than by individuals, but the antiquity of this arrangement, its origins and its significance, have been much disputed; indeed, it has been suggested by Ficker and Maitland that this apparent family ownership is in fact only the product of the working of various rules of individual inheritance. This may very well be, for a similar process can be observed in other periods of legal history. The results produced by a strict settlement in the eighteenth century, for example, might easily produce the impression upon an historian of a thousand years in the future, who had no access to the deeds, that land was held by the family, and yet a history of real property

[1] For a summary of the problem, see Vinogradoff's article, *Village Communities*, in the Encyclopædia Britannica (1911).

law would show clearly that such a settlement was in fact the outcome of an ingenious arrangement of very individualistic rules of property and inheritance. Then, again, good reasons have recently been shown for believing that another body of rules, in themselves individualistic, combined to produce in France the system of community property between husband and wife.[1] These considerations will serve as a warning that there is no absolute necessity in the nature of things why property should first have been ascribed either to the community or the family before it became individual. Generalizations of this sort cannot be used as aids to research; they are in fact useless for all purposes, until independent research has established their truth.

In tracing the history of the heritability of land we are faced by two problems. The first is comparatively easy; the practice, and later the law, relating to the descent of great military fiefs, are fairly clear. A number of documents have survived relating to these matters, for they were of great political importance. But, as we have seen, the vast properties which were granted as benefices to nobles and rulers consisted only in part of land for use and occupation; the major portion of these immense holdings certainly consisted of superiorities and fiscal rights superimposed upon the humbler orders of society who occupied and worked the land according to customs which in all probability were older than feudalism. The second problem, and one of much greater difficulty, is the question of what law governed the descent of land in the middle and lower classes. These people were of no great political importance; their pedigrees are almost always lost. The succession of owners of the more modest estates is difficult to establish and the records of their litigation only begin at dates much later than the critical period which we should like to examine. Only occasionally do we find surviving collections of deeds which throw some light upon the law under which they held their land. This is particularly true of the Anglo-Saxon age. We have, of course, a good deal of evidence (although it is by no means easy to interpret) relating to bookland, but it is obvious that bookland was a luxury for the wealthy; much of it was held by churches and monasteries and so the question of inheritance

1 See Lemaire, *Les Origines de la Communauté de Biens entre Époux*, Revue Historique de Droit Francais, 1928, 584–643.

does not arise. There is ground for believing, however, that Bookland was alienable and devisable. It would seem from a passage in the Laws of Alfred that it was possible to insert in the charter constituting bookland limitations upon its descent, and that those limitations would be upheld in law. In this way Anglo-Saxon society of the ninth century acquired a device very closely resembling the entail of the fourteenth century. Judging from surviving sources, however, no very great use was made of these powers. It is when we come to folkland that we reach the difficult problem of how land descended by common custom among the mass of the middle class population, and here it is extremely difficult to reach a conclusion.

It may be helpful to consider the problem of inheritance in connection with that of alienation. Land was certainly not yet a commodity of commerce. The buying and selling of land on a large scale can hardly have existed. The population was very small and there was enough land to meet its requirements many times over, and it would seem that the land worked by a family in those days, as now, was worked by the labor of every member of the family. One of the striking features of peasant life is that every member of the family works, from the oldest to the youngest. The death of the head of the family can hardly have made very much difference beyond the substitution of a new head to control the general working of the estate; the other members of the family must surely have continued their old tasks. Under such circumstances there was little room for enquiry as to the exact canon of descent, as to where precisely the legal title was, or as to the exact nature of the interests enjoyed by junior or collateral members of the family. Under the new head as under the old, the whole family was supported by the whole of the land, living most probably together at one table. While such conditions lasted, even quite a vague custom would have been sufficient to regulate the family patrimony. Questions as to ownership and restraints upon alienation and the nature of heritable rights would begin to arise in only a few situations. The most important of these, no doubt, was created when one member of the family attempted to alienate a substantial portion of the property to a church. It is in this situation that family rights are brought to the fore on the continent, and we find the Church taking every

possible precaution in order to secure its title. How far these precautions were absolutely necessary and how far they were merely politic, it is impossible to say. In any case, it is clear that on the continent an alienation to a church was accompanied by a confirmation by several members of the family who were deemed to have an interest in the land. This does not mean that the land was owned by all the family and that all must join in a conveyance. It seems rather that the Church felt it necessary or prudent to obtain the ratification of those who had expectations in the land. We find, for example, that when a gift was made to a church the donor would be required by ecclesiastical discipline to obtain the consent of his kinsmen, if necessary, by paying them a substantial sum of money. In England we find presumptive heirs joining in a conveyance in the eleventh and twelfth centuries but how much older this requirement is can hardly be stated—evidence discussed by Sir Paul Vinogradoff from the tenth century leaves us in doubt whether such consent was absolutely necessary.[1] After the Norman Conquest by means unknown it became the regular form in conveyances to mention the consent of expectant heirs, while when we come to Glanvill we find this statement:[2]

"Every freeman, therefore, who holds land can give a certain part of it in marriage with his daughter or any other woman whether he has an heir or not, and whether the heir is willing or not, and even against the opposition and claim of such an heir. Every man, moreover, can give a certain part of his free tenement to whomsoever he will as a reward for his service, or in charity to a religious place, in such wise that if seisin has followed upon the gift it shall remain perpetually to the donee and his heirs if it were granted by hereditary right. But if seisin did not follow upon the gift it cannot be maintained after the donor's death against the will of the heir, for it is to be construed according to the accustomed interpretation of the realm as a bare promise rather than a true promise or gift. It is, moreover, generally lawful for a man to give during his lifetime a reasonable part of his land to whomsoever he will according to his fancy, but this does not apply to deathbed gifts, for the donor might then (if such gifts were allowed) make an improvident distribution of his patrimony as a result of a sudden passion or failing reason, as frequently happens. . . . However, a gift made to anyone in a last will can be sustained if it was made with the consent of the heir and confirmed by him.

1 Vinogradoff. *The Transfer of Land*, 1 Collected Papers, 157. The transactions there discussed come from a district where there was Danish influence, which is leaning towards freedom of alienation, see above, p. 8.

2 Glanvill, vii, 1.

"Moreover, when anyone alienates his land in marriage or otherwise, he has either inherited land only, or acquired land only, or some of both sorts. If he only has inherited land he can give a certain part of it, as we said before, to whomsoever he will. If, however, he has several legitimate sons it is not at all easy without the consent of the heir to give any part of the inheritance to a younger son, because if this were allowed the disinheritance of elder sons would often occur on account of the greater affection which fathers most frequently have for their younger sons. But can a man who has a son and heir give a portion of his inheritance to his bastard son? If this were true then a bastard is in a better condition than a legitimate son—and nevertheless this is the case.

"If, however, a man has only acquired property then he can alienate it but not all of it because he cannot disinherit his son and heir."

Glanvill continues to give several more pages to the same effect. It would seem that he is anxious to frame general and reasonable rules, but that English law had not yet reached the concrete and definite provisions such as are to be found in various continental systems. Glanvill is unable to tell us plainly that a man can alienate one third or one half of his patrimony or his conquest; such rules existed on the continent and Glanvill would surely have told us if there were a similar rule in England; but all he says is that a man must be "reasonable," that he must not disinherit his heirs, and that he can only alienate "a certain part." Glanvill also distinguished between patrimony and conquest, but this soon dropped out of English law. It would almost seem that the vague rules which Glanvill mentions were only insecurely established, for not only were they indefinite on the vital question of how much land could be alienated, but also when we come to Bracton two generations later we find no trace of them left.

Still, there can be no doubt that Glanvill is good evidence of a feeling that alienation ought to be restricted and that expectant heirs should not be disappointed. Starting from this fact we may say that the situation was probably something like this. Under ordinary circumstances just after the Conquest land was equally divided among all the sons, and it was considered improper—Glanvill would say illegal as well—for a father to alienate during his lifetime more than a reasonable portion of his patrimony, and particularly reprehensible if he advanced one son to the disadvantage of another. The policy of the rule seems to be to maintain absolute equality among all the sons, and Glanvill even asserts that the rule was pushed to such an extremity that a man could

advance a bastard son (who, not being in the family, is not limited as to the amount which he can take) although he cannot show the same favor to a legitimate son. In short, the restrictions upon alienation have as one of their principal objects the maintenance of equality among the legitimate sons.

We now come to the development of another rule which was to cause considerable difficulty, the rule of primogeniture. Under this system the whole inheritance descends entire to the eldest son, his younger brothers receiving nothing.

This form of descent first appears in military fiefs, where there was obvious foundation for the policy of keeping the fief entire. It was long an opinion that primogeniture was introduced into England at the Norman Conquest, but Maitland felt uncertain whether primogeniture in Normandy had in fact proceeded any further than in England, and concluded, therefore, that we could not blame the Normans for "our amazing law of inheritance." It would seem that in the eleventh century there were two tendencies in Normandy struggling for supremacy, the first being primogeniture and the maintenance intact of the whole patrimony, and the second being an attempt to compromise between this and equal partition through the device of parage, whereby each brother had his share but held feudally of the eldest who represented the whole inheritance. It has recently been suggested that—

"it is the will of the father which first of all determined how his property should descend, and the practice of primogeniture grew into a custom of primogeniture.

"As for the date, it seems that of our two Norman systems, the one of absolute primogeniture, and the other of partition and parage, the former is the more ancient. It was already dominant, if not in exclusive use, in the eleventh century. The second system which in the end was to become the general custom only began to prevail at a more recent date." [1]

It may well be that Norman example played a considerable part in imposing primogeniture upon English military fiefs.

It will be evident that with the spread of primogeniture to land which was originally partible some modification will have to be introduced into the rule which Glanvill mentions restraining alienation. Glanvill tells us that a father has no right to alienate his land unreasonably, or in any way which would benefit one son

[1] Genestal, *La Formation du Droit d'Ainesse*, 1 Normannia, 174.

more than another. But could these restrictions be maintained after the advent of primogeniture? Would it be reasonable to maintain the restrictions upon alienation seeing that their original object was to maintain equality among the sons, although by recent changes that equality has been abolished and the whole inheritance goes to the eldest? The force of these objections seems to have been felt, and the rise of primogeniture inevitably brought with it freedom of alienation. Henceforward the eldest son will inherit the whole of the father's property existing at his decease, but during his lifetime the father can make any provision which he sees fit for the younger sons without requiring the consent of his heir. These great changes occurred just about the year 1200, but how they were carried out is a mystery. It may perhaps have been a few decisions of the King's Court which sufficed to enforce the new rule—or rather to turn the balance definitely in favor of one of the two competing systems of succession. Perhaps freedom of alienation was partly achieved through the doctrine of warranty. It began to be the custom for an alienor to bind himself and his heirs to warrant the alience against all men. An obvious result of this obligation is that no person who is bound to warrant can claim the land; he is barred by his warranty. As soon as the rule is established that a man's heir is his eldest son, then that eldest son will inherit the burden of warranty and be barred by it. In this way a deed with warranty will be sufficient to bar whatever claim the grantor's eldest son might have.

Besides appearing in the highest classes of society among the nobles and military tenants, impartible succession also appears among the villeins. The economic basis of this practice is clearly the endeavor to maintain the villein's holding intact and therefore sufficient to sustain the whole of his family and to meet the heavy burden which it owes to the lord. The rest of the freeholders in England continued what is assumed to be their former practice of equal partition among sons. For a time this was the general rule in all free non-military tenures (which are compendiously referred to as socage). It was inevitable, however, that the steady pressure of the royal courts should tend to eliminate exceptions and peculiarities, and as time goes on primogeniture gradually spreads to socage as well. The only exceptions were the boroughs which held to their custom of burgage, and the county of Kent which retained its ancient practices under the name of gavelkind.

CHAPTER IV

TENURES AND INCIDENTS

As feudalism progressed attempts were made to introduce some sort of order into the immense variety which had so far prevailed, and so a large number of different characteristics which owed their rise to local or peculiar circumstances were finally classified, with the result that there were established a few categories which covered the greater number of tenures.

Knight service was perhaps the principal feudal tenure, and its history in England easily falls into three periods. In the first, from the Conquest in 1066 to about the year 1166, it was a living institution. The tenant did military service in the King's host accompanied by the number of knights required by his tenure. In theory he was only bound to serve forty days and never outside of the Kingdom. Great lords were usually assessed in multiples of five or ten knights, since ten knights formed a military unit called a *constabularia;* the lord in turn secured himself the services of the requisite number of knights by subinfeudating to other tenants who assumed the burden.

In 1159 and again in 1166 we find prominent mention of scutage, and this introduces the second stage in the history of knight service. The knight is becoming less important and professional mercenaries (as King John discovered) are more effective in the field. And so the lord paid to the King a sum of money instead of bringing his knights with him; this payment was called scutage, and the lord of course was allowed to recover the sum from those of his undertenants who otherwise would have been liable to serve in person.

The third stage is marked by the decline of scutage in or about 1266, and from this date for four hundred years (1266 to 1660) knight service remained as only a troublesome but lucrative anachronism. It was a very heavy burden upon certain of the landowners, and when it was finally abolished at the Restoration the landed interest succeeded in shifting it onto the nation at large by giving to the Crown instead of its feudal dues an excise on

beer—an example of "the self-interest which so unhappily predominated even in representative assemblies," as Hallam indignantly expressed it.

The incidents of knight service were numerous and important. In the first place there was homage, an ancient and very solemn ceremony which established a strong and intimate relationship between lord and tenant.

> "He who has to do homage . . . ought to go to his lord anywhere he can find him within the realm or even elsewhere if he can conveniently get there; for the lord is not bound to seek out his tenant. And he ought to do his homage thus. The tenant ought to put both of his hands between the hands of his lord by which is signified on the lord's side protection, defence and warranty, and on the tenant's side, reverence and subjection. And he ought to say these words: I become your man for the tenement which I hold of you, and I will bear you faith in life and member and earthly honor against all men, saving the faith due to the lord King."[1]

In the *Leges Henrici* we find the highest expression of homage. The tenant is to be faithful to his lord even under trying circumstances; if the lord seizes the tenant's land or deserts his tenant in mortal peril he loses his lordship, but the tenant must be long-suffering and must support the lord's ill-treatment for thirty days in war time, and for a year and a day in time of peace; the lord must warrant and defend his man, while if the man kills his lord he is guilty of blasphemy against the Holy Ghost, and will be skinned alive, so it seems. Later still, Glanvill will observe that difficult situations may arise when a tenant has done homage to two lords and those two lords declare war upon each other. Homage was abolished in 1660,[2] but the simple oath of fealty which accompanied it is still in existence.

Another incident of knight service is relief, which was originally the price paid in order to secure a re-grant of one's ancestor's land in times when the hereditary principle was hardly established in military tenures. At first it was arbitrary, but a series of charters and statutes regulated it in proportion to the number of knight's fiefs. If the tenant held of the King in chief, the King had prerogative rights and had the *primer seisin* of all the tenant's lands, whether held of the Crown or not—and it is in these in-

[1] Bracton, f. 80.

[2] Stat. 12 Car. II, c. 24; Pound and Plucknett, *Readings*, 653–655.

tenser forms of feudal right claimed by the Crown that we first find the word "prerogative."

We now come to wardship and marriage. Wardship means two things; for the lord has the custody of the tenant's land until the tenant comes of age, and retains the profits, subject to a liability to educate the ward in a manner befitting to his station, and this wardship of the land may be separated from wardship of the body; and at the same time daughters must marry with the consent of the lord. At some time between Glanvill and Bracton this obligation was also imposed upon boys, and hence arose the system of lords, and especially the Crown, selling wardships and marriages which in the middle ages were used as a means of investment by the wealthy. In its origin, no doubt, it goes back to the time when hereditary succession in military fiefs was subject to the discretion of the lord, who might as a favor act as, or appoint, a guardian, until the heir came of age, instead of granting the fief to a stranger. The ancient custumal of Normandy defends the institution on the grounds that homage is a more sacred bond than merely blood relationship.

"A fatherless heir must be in ward to someone. Who shall be his guardian? His mother? No. Why not? She will take another husband and have sons by him, and they, greedy of the heritage, will slay their first-born brother, or the stepfather will slay his stepson. Who then shall be the guardian? The child's blood kinsmen? No. Why not? Lest, thirsting for his heritage, they destroy him. For the prevention of such faithless cruelty, it is established that the boy be in ward to one who is bound to his father by the tie of homage. And who is such an one? The lord of the land who never can inherit that land in demesne; for heirs of a noble race always have many heirs. Besides they should be brought up in good houses and honourably educated. Those who are brought up in their lords' houses are the apter to serve their lords faithfully and love them in truth; and the lords cannot look with hatred on those whom they have reared, but will love them and faithfully guard their woods and tenements and apply the profits of their land to their advancement." [1]

Then, too, the tenant in knight service owed aid to his lord. The emergencies under which a lord could call for aid were at first numerous; it might be to pay his debts, to stock his land, to help him pay a fine to the King. But in the end aids are only due (unless by voluntary consent) to ransom the lord's person, to

1 1 Pollock and Maitland, 326.

knight his eldest son, and to marry his eldest daughter. The long struggle for the principle that taxation must be by consent was finally fought out in connection with the parliamentary taxation of personal property, but all the same it has a very early counterpart in the struggle to make aids limited in extent and occasion, unless freely voted by the consent of the tenants.

Finally, we come to the incidents of escheat and forfeiture. Escheat is due to the lord of the fee on the death of a tenant without an heir, or upon his committing felony. It is important to note that escheat is not necessarily to the Crown; even at the present day, if a mean lordship can be proved, an escheat may go to the lord and not to the Crown. The value of escheat to lords has depended a great deal upon the meaning of the word "felony." In early times the felonies were few, but among them was the important one of deliberately refusing to do the services due to one's lord; this being a felony, escheat followed upon conviction and the lord resumed the land. Soon, however, cesser of services ceased to be a felony, and the lord in many cases had no remedy against a tenant who wilfully withheld services until the Statute of Gloucester (1278). Moreover, in cases of felony the Crown established its right to year, day and waste, holding the land for a year and a day and wasting it before it went to the lord as an escheat. In the case of treason the whole of the traitor's lands, of whomsoever they were held, are forfeited to the Crown and the lord gets nothing.

Another species of tenure is described as sergeanty and may be either grand or petty; in the former case it will resemble knight service. It is of little historical importance, although several sergeanties still survive in connection with coronation services.[1]

We now come to the tenure of socage, which really consists of a great variety of tenancies whose only common factor is that they are not military: sometimes homage may be due but not scutage, wardship[2] or marriage. The services are sometimes purely nominal, being the result of gifts to younger members of the family or to servants, or of a sale effected by subinfeudation. Sometimes we find a moderate rent, especially where a church is the lord;

[1] Much interesting material is to be found in Round, *The King's Sergeants and Officers of State.*

[2] Sometimes the heir is in ward to a near relative, who is accountable on the ward's coming of age.

sometimes labor services are due, some of them so numerous and heavy that it is not easily distinguishable from villeinage. It is clear that socage is gradually becoming more free and of higher social status, until in the end it becomes the one free non-military tenure, for the statute abolishing chivalry in 1660 converted it into free and common socage. As we have already mentioned, the rule of primogeniture was soon applied to socage land.

Tenure in burgage was peculiar to towns, although it varied considerably from place to place. A study of burgage will soon make it clear that a borough in the middle ages was still an agricultural unit, being in fact a village or a manor which has acquired a certain measure of self-government. Burgage tenure was not subject to aids, marriage or homage and only rarely to relief. Wardship, however, had been developed in the course of a different history from that of military tenures, and usually pertained to the kinsmen of the ward or to town officials. Frequently land was devisable by local custom, and if a tenant wished to alienate, his relatives often had the right to the first option (*retrait lignager*) while a second option may go to the lord (*retrait féodale*). Boroughs were liable to a form of taxation called tallage and to a variety of money rents.

Of tenure in free alms, or frankalmoign, it is only necessary to say that it was for the most part peculiar to the Church and that it owed feudal services unless it were of that sort which is called "free, pure and perpetual," in which case it only owed spiritual services.[1]

Finally, a word must be said about villeinage, for we shall not obtain a true picture of the common law in the middle ages if we neglect the large mass of population which was excluded from its benefits. As we have already remarked, in the early thirteenth century the common law was hesitating whether to take cognizance of unfree land. It soon decided not to, and we have already mentioned the results which this had upon the villein's legal position. It was not until the close of the fifteenth century that courts of equity and prerogative were prepared to give protection, cautiously and timidly, to villeins, principally in cases where intervention could be justified as sustaining a manorial custom, and not until the sixteenth century can we be sure that the common

1 Above, p. 16.

law would follow this example, while it remained for Coke at the beginning of the seventeenth century to establish the villein's rights on the common law itself, under the name of copyhold. As for his personal status, Bracton assures us that a serf is free against all men except his lord, against whom the only protection he receives is that of life and limb. The law was never consistent in dealing with the villein's personal property; in theory all a villein's chattels were deemed to belong to his lord, but in practice we find the villein doing business, being fined, and paying taxes exactly like other men. His unfree status was hereditary, but a villein who ran away and was *de facto* free was spoken of as being "seised of his liberty," and this seisin might become the basis of a reasonably good title to freedom, subject only to the condition that he keep away from the manor to which he belonged, for if ever he returned (as a mayor of London once discovered) the lord can seize him and put him in irons to prevent him leaving the manor again.

Moreover, it must be remembered that the existence of tenure of any sort added another complication to the question of freedom of alienation. We have already mentioned this subject from the aspect of the family, and now it must be considered from the point of view of feudal law. Alienation may be effected in two ways. The grantor may substitute the grantee in his own place in the feudal pyramid; or else he may subinfeudate by creating a new tenure between himself as lord and the grantee as tenant. By the time the feudal formula had been applied to all land, it became clear that either of these two methods of alienation might work hardship to the grantor's lord. In the case of substitution the incoming tenant might be poor, dishonest, or unfriendly, and in either case the lord might find it more difficult to exact his services. In the case of subinfeudation the situation is different. Although the grantor may have disposed of the whole of his holding to the grantee, yet the feudal relationship between the grantor and his lord still continues, the only change being that the grantor, instead of being tenant of the land in demesne, is now only tenant in service, and instead of an estate in possession in land he has an incorporeal hereditament. Whatever services he owes to his lord are still due, and the lord can exact them by distraining any tenant who holds the land—in the present case, the grantee, the law

allowing the grantee a remedy over against the grantor who must "acquit" or reimburse him. In the case we have put the lord's principal loss through his tenant's subinfeudation is in respect of wardships, relief, marriage and escheat.

Let us call the lord A and his tenant B, and suppose that B holds of A by substantial services, and that the tenement is large and productive of a good revenue. As long as this relationship lasts the lord A derives a regular income from the services and has the expectation of important profits at irregular intervals. Upon B's death he may have the wardship and marriage of his heir, and if the heir is young the profits will be considerable; if the heir is already of age he can expect a substantial relief; if there is no heir at all, B's tenement will escheat, and the lord will therefore enjoy a very considerable windfall; so, too, if the tenant commits felony. Let us now suppose that B sells his land. He receives a large sum of money from the purchaser, which, of course, is quite beyond the lord's reach. B then enfeoffs C, the purchaser, to hold of him by the nominal service of a rose at midsummer. As a result of this arrangement B only retains a seignory of which the nominal service is the symbol. We have now to consider how this arrangement will affect A. The regular services due from B to A are still secure, but the occasional profits of A's lordship are seriously impaired. Relief which is based upon the value of the tenement will no longer be considerable, for B's tenement produces nothing but a rose at midsummer. The wardship and the marriage of B's heir are likewise worthless, for the tenement is of purely nominal value and under the most favorable circumstances the guardian could only collect a few roses in the course of a minority of twenty-one years; if B commits felony the lord's escheat once again will only consist of the nominal services which B reserved. It is clear that we have here a very difficult situation, which, moreover, must have very frequently arisen. The lord's position is even worse when B alienates to a church, for then the seignory which B reserved would merely be a lordship over a corporation which never dies, never marries, and never commits felony.

In Normandy this difficulty was met by the regular requirement of a confirmation of any tenant's alienation by his lord and by all superior lords up to the duke himself; this enabled a lord to safe-

guard his interests. In England, however, this fairly simple requirement was not developed, and for a long time there was doubt as to the extent to which a feudal lord could restrain alienation by his tenants. Glanvill makes no mention whatever of any feudal restrictions, which must be interpreted as meaning only that the King's Court will not enforce them; it is quite probable that such restrictions existed in some form and that they were enforceable through the lord's feudal court, for however much the money value of a lord's seignory might be impaired by these transactions the lordship could never be destroyed, and the land, howsoever it was dealt with, still remained within the lord's fee and subject to his court. In the third Great Charter (1217) we find that a complaint by the barons evoked the following provision (c. 39):

"No freeman henceforward shall give or sell so much of his land that the residue shall be insufficient to support the service due in respect thereof to the lord of the fee."

This is the first express limitation of a feudal character upon alienation in English legal history. When we come to Bracton he assures us that the arrangements we have just described may very well work to the financial loss of the lord, but nevertheless he has suffered no injury which can be remedied at law; if Bracton is reduced to this paradox we may be sure that it is because under contemporary law the lord was completely helpless in such a case, and that the provision in the Great Charter was nothing more than the expression of an unenforceable principle. During the reign of Henry III the grant of land to churches was becoming very frequent; more than that, tenants practised collusion with churches in order to defeat feudal services. The Great Charter of 1217 contains the first direct provision against this practice also:

"It shall not be lawful for anyone henceforward to give his land to any religious house in order to resume it again to hold of the house; nor shall it be lawful for any religious house to accept anyone's land and to return it to him from whom they received it. If anyone for the future shall give his land in this way to any religious house and be convicted thereof, the gift shall be quashed and the land forfeit to the lord of the fee."

Here we have the serious sanction of forfeiture provided, and yet it was ineffectual to prevent these practices. At the very

moment when Bracton was writing, the barons in their petition of 1258 gave as one of their grievances "that religious persons ought not to enter the fees of earls and barons and others against their will, whereby they lose forever wardships, marriages, reliefs and escheats." As long as the barons were in the ascendancy they were able to secure legislation in this direction by c. 14 of the Provisions of Westminster (1259). At the final settlement after the Barons' War embodied in the Statute of Marlborough this provision, however, was omitted—perhaps we may see here an effect of Henry III's conspicuous favor to the Church which characterized the whole of his reign. It was under his son and successor, Edward I, that the problem was finally settled by the Statute of Mortmain (1279) which re-enacted in broader terms the provision of the Great Charter of 1217, again imposing forfeiture to the lord as a penalty for unauthorized alienations in mortmain. The most remarkable feature of this statute, however, is one which does not appear in the text. There is no provision in the statute for licenses to alienate in mortmain; nevertheless immediately after the statute was passed, such licenses were lavishly granted by the Crown. It will be observed that the Crown dispensed from the statute and received fines for doing so without any statutory authority, and even in cases where the loss occasioned by the alienation fell not upon the Crown but upon a mesne lord.

The loss occasioned by alienations other than those in mortmain still continued to give trouble, and it was not until 1290 that the Statute *Quia Emptores* (1290) afforded a solution.[1] By this statute subinfeudation was absolutely forbidden in the case of fee simple; alienation was henceforth to be by substitution with an equitable apportionment of the services. The statute expressly stated that alienation was to be free, and consequently the Crown had everything to gain through the enactment of the statute. No new tenures could be created, although in the inevitable course of events many old tenures became extinct and escheated to the lord above. The Crown was therefore gradually becoming less separated by intermediate tenures from the tenant in demesne.

Tenants in chief of the Crown, on the other hand, were being subjected to increasing restrictions. Before they could alienate

1 Translated in Pound and Plucknett, *Readings*, 650.

they had to satisfy the Crown that it would suffer no loss thereby, and from 1256 onwards we find an increasing number of restrictions upon tenants in chief;[1] as for the freedom of alienation granted by the Statute *Quia Emptores,* it was held that this could not be construed as restraining the Crown in the absence of express words to that effect.

In this and the preceding chapters we have therefore traced the development of the freedom of alienation (except into mortmain), and the removal of the somewhat vague restrictions based on ideas of family interest and the interests of the feudal lord. Even the Statute of Mortmain was easily dispensed with, and we may therefore assume that by the close of the thirteenth century land was freely alienable by all except tenants in chief of the Crown.

There remains to consider the point where the alienation is not that of a tenement held in demesne but of one held in service. How far can a lord alienate his seignory and compel his tenant to accept the new lord? It would seem that in general he can do so, the sole difficulty arising where the bond of homage exists between the old lord and the tenant. In such a case the tenant is entitled to object if the incoming lord is his mortal enemy or too poor to be able to sustain the burden of warranty which is such a valuable outcome of homage. Consequently we find that the King's Court will compel a tenant to attourn all services to a new lord save only homage, and as to this it seems to have hesitated.

Occasionally attempts have been made to estimate the effects of tenure upon English law, but it is curious that the subject has been so little explored.[2] A comparison between English and continental law in this respect should be fruitful, for on the continent the feudal lawyers admitted that tenure divided the ownership of the land between the lord and the tenant. English law refused to admit this proposition. Instead of regarding lord and tenant as dividing between them the ownership of one thing, it looked upon each of them as a complete owner of two different things, the tenant being the owner of the land in demesne and the lord being owner of a seignory, which although incorporeal

[1] For the text of an important legislative writ of this year, see 12 Law Quarterly Review, 300.

[2] See Hogg, *The Effect of Tenure on Real Property Law,* 25 Law Quarterly Review, 178–187.

was treated in every way as property. One result, therefore, of the doctrine of tenure as it was developed in England, was not to divide ownership between lord and tenant but to add the lord's seignory to the growing list of incorporeal hereditaments which mediaeval law was particularly fond of handling on exactly the same lines as real property.

The Statute *Quia Emptores* did much to create a great gulf between the fee simple and the lesser estates; a fee simple could not be subinfeudated, but the lesser estates were expressly removed from the operation of the statute. Tenure continues to be created, therefore, by means of subinfeudation in a case of life estates and estates tail; particular tenants all hold feudally of the reversioner or the remainderman in fee. We may hazard the suggestion that English law treated these two types of tenure in different ways. The tenant of a fee simple by virtue of a subinfeudation (which must have dated from a time earlier than 1290) was regarded as an unrestricted owner and the interest of his lord was no limitation upon his own; the tenant held the land and the lord held the seignory, both of them in complete ownership. When we come to the tenure of estates less than a fee, we find a very different scheme of things. The tenants in this case are consistently treated in the mediaeval cases as limited owners, and it soon becomes the theory that the total of the interests of all the tenants, together with that of their lord, constitutes the ownership of the land in question. We therefore find that in the case of the entail ownership is very successfully divided between the parties, while in the case of the fee simple, lord and tenant both have the fullest interest recognized by the law, the one in the land and the other in the seignory. This division of ownership in the case of the entail is certainly the origin of the common law system of estates and has therefore played an enormously important part in shaping the law of real property. It is less easy to see how the existence of horizontal hereditaments can be regarded as a result of tenure, as has been suggested by Mr. Hogg.

CHAPTER V

BRACTON AND THE FEE SIMPLE

In the preceding chapters we have seen that a fee simple was inheritable by primogeniture since about 1200; that it was alienable without the consent of presumptive heirs since about the same date; and that nearly a century later it became freely alienable without the lord's consent as a result of the Statute *Quia Emptores* of 1290. The first two of these advances had already been made by the time of Bracton, and from his day, too, we have a large number of surviving charters which attest the frequency with which land was transferred. Bracton has some interesting remarks upon the nature of a fee simple, and one of the most remarkable things about them is the fact that he approaches the subject from the point of view of current conveyancing forms. This is somewhat unfortunate, for those forms grew up as a matter of convention and were not settled by men who were particularly concerned in defining the nature of a fee simple, their main care being only to use a form of words which had a conventional meaning; whether that form expressed in precise and technical terms the exact nature of the operation involved was of less importance. The thing that mattered was to use a form of words which had a recognized legal effect. However, when Bracton discusses the nature of a fee simple he does so by means of a commentary upon the conventional charter of feoffment. In his day a fee simple could be conveyed by a deed which said that the donor gave and granted and by his charter confirmed to the donee and his heirs the land in question, to have and to hold by specified services either of the lord of the fee or of the donor, who finally bound himself and his heirs to warrant the donee and his heirs against all men. Bracton's discussion centers around the word "heirs." A gift to A. and his heirs was the conventional form for conveying the maximum legal interest, a fee simple, and Bracton first of all has to explain that in spite of the words such a charter conveys the whole estate to A. and nothing at all to his heirs; as we should say

to-day, "heirs" is a word of limitation, but not of purchase. As the discussion proceeds more difficulties appear. A gift to A. and his heirs gives the full estate to A. and nothing to his heirs, but neither does it give anything to the assigns of A. If the donee A. alienates over, can this alienee claim the benefit of the warranty which the donor bound himself to give only to A. and his heirs? Bracton thinks not, and apparently this opinion was widespread, for we find about this time numerous charters in favor of the donee, his heirs and assigns, evidently drawn to meet this situation. Under such a charter the donor would be bound to warrant A., his heirs and his alienee. By the time we get to the beginning of the fourteenth century the word "assigns" ceases to be necessary—at least such was Maitland's opinion, adding that "on the whole we cannot doubt that the use of this term played a large part in the obscure process which destroyed the old rules by which alienation was fettered."[1]

[1] 2 *P. and M.* 14, n. 4. As an alternative to his deduction from *Y. B. 33 & 35 Edw. I*, 362, it may be suggested that all that Bereford meant when he said that "there is no force in that word 'assigns,' but simply in the word heirs of Agnes," was that the word "assigns" was unnecessary and even repugnant in a deed establishing a *maritagium;* wherefore he would construe the deed as if the word "assigns" were absent and the gift were in the common form establishing a *maritagium*. The necessity of mentioning assigns in a conveyance of a fee simple is not discussed in the case.

CHAPTER VI

THE RISE OF THE ENTAIL

As we have seen, it was possible under Anglo-Saxon law to impose limitations upon bookland which resemble the entail rather closely. There is no evidence, however, that this practice survived the Conquest, or that it was used to any considerable degree even in Anglo-Saxon times. We have also remarked that one of the most frequent occasions for alienating land was the establishment of a younger branch of the family, and particularly the endowment of a daughter. It is in this latter that the origin of the entail must be sought. The *maritagium* was an institution of great antiquity which in the course of time took fairly definite form as the result of many years of custom. The terms and incidents of a *maritagium* were perfectly well known and in many cases were not embodied in any written document. We do find a few examples, however, of deeds from the twelfth century which show us the principal characteristics of the gift in free marriage, and these, supplemented by Glanvill, make it clear that the *maritagium* was a well-defined legal institution. In the twelfth century the gift in *maritagium* seems regularly to declare that the donor gives the lands in question together with his daughter to the donee in frank marriage—it is worth noting that the earliest forms are gifts to the husband alone and not to the wife nor the two jointly.[1] From Glanvill we learn the conditions attaching to such a gift. He tells us that if the marriage is "free," the feudal services will not be due (for it is clear that he contemplates the establishment of frank marriage by means of subinfeudation). Feudal services, however, will revive at the moment the third heir enters. The descent of frank marriage seems already in Glanvill's day to have followed the same canon as the thirteenth century would have expressed in the formula "to A and B and the heirs of their bodies." As soon as the third heir enters feudal services revive—and clearly the

[1] Round, *Ancient Charters*, no. 6; Madox, *Formulare Anglicanum*, cxlv, cxlvi, cxlviii.

presumption is that by this time (three generations average one hundred years) the new family will become established and perfectly capable of performing feudal services. Glanvill also tells us that the third heir is the first one who shall do homage which henceforth shall be due from all his heirs. The reason for this is that while homage has not been done there will always be the possibility of the land reverting to the donor upon the extinction of the donee's line. When, however, homage has been taken upon the entry of the third heir the lord becomes bound to warrant and his reversion is therefore destroyed.[1] The evidence all goes to show that these feudal technicalities were imposed upon an older institution whose characteristics apparently were heritability by a limited class of heirs, failing which there would be a reversion to the donor unless three heirs in succession had entered; in the latter case the gift became unrestricted and the reversion was destroyed. Glanvill does not say so, but it would rather seem that until the third heir had entered the *maritagium* could not be alienated; it is only by supposing some such rule as this that the provisions concerning feudal service and the reversion take a consistent shape. Glanvill furthermore assures us that until homage has been taken the tenants are in a particularly weak position, since the donor and his heirs are not yet bound to warrant. This seems to be a difficulty created by applying feudal rules to an institution which was really more ancient. In order to circumvent it the constitution of a *maritagium* was accompanied by a pledge of faith binding the donor and his heirs to maintain the arrangement. Now the pledge of faith was a purely ecclesiastical affair consisting of a ceremony whereby the promisor put into pledge or pawn his hopes of future salvation as security for the performance of his obligations. Over such matters only the Church courts had competence, and so litigation concerning a *maritagium* which involved the relationship between the donor and the donee had to take place in ecclesiastical courts. It may be remarked that here as at many other points the Church exercised a powerful influence in insuring the stability of the family by securing an adequate economic foundation for each new family. As we shall see later on, the Church also used its

[1] On the absolute failure of heirs, the lord could still take by escheat, but on the failure of the heirs of the body of the donee the lord's reversion (while it lasted) would exclude the heirs general.

influence to secure proper dower rights for the sustenance of widows. Finally, Glanvill informs us that "when a man has received lands with his wife in marriage" they shall revert to the donor after the death of the wife unless issue has been born alive; it is not necessary that it should have survived. This rule bears an obvious resemblance to the rule of curtesy, but for our purpose its importance lies in the fact that until the birth of issue the husband's estate is very slender; it would be quite easy for a donee to get the impression that for practical purposes the gift only became a really valuable gift upon the birth of issue. From this it would be a very short step to the theory that such a gift was really conditional upon the birth of issue—and this idea was to play an important part in the future.

In the period between Glanvill and Bracton we get an increase in the number of written documents and considerable variety in their forms. Instead of conveying an interest which is described simply as a *maritagium,* donors set out in detail the principal points of the arrangement. We therefore find gifts to the man alone, or to the woman alone, or to both of them jointly, and the descent limited to the heirs or to the heirs of the body of either or both, according to the fancy of the donor. It is during the same period that we find the appearance of some other forms of gifts which we believe must be regarded as derived from or imitated from the *maritagium.* One of the peculiarities of the free *maritagium* is the exemption from feudal dues for three generations, which seems to be a heavy price to pay in order to prevent the taking of homage and to preserve the reversion. We rather believe that it was the *maritagium* which was the first institution in which a reversion was saved, and it may very well be that donors would wish to devise some other means whereby a reversion could be saved without foregoing feudal services for three generations; and indeed in other circumstances than those under which the *maritagium* was constituted. This is the explanation we offer for the rise and early history of the entail. The most striking feature of the *maritagium* was the reversion to the donor upon the failure of the line of descendants whom he wished to benefit, and the entail was an attempt to extend this characteristic to gifts which were not in "free" marriage, but in that form of the institution which was subject to feudal dues, as

well as to gifts which might not be made at all in contemplation of a particular marriage.

Numerous difficulties arose. The only body of rules then in existence had been developed in connection with the *maritagium*. They were admirably devised for the purpose of governing property given to a new household in the expectation that it would become a permanent family, but when they were applied to these other situations they worked confusion and mischief. In the midst of this confusion Bracton was writing, and it must be said that he did nothing to make it clearer. He begins by stating an excellent principle; all the limitations expressed in the gift (which taken together he calls the *modus*) must govern the gift, "for the *modus* will override common law because a *modus* and a covenant restrain the law." If this principle had been observed then the newer forms of gifts which we have described would have presented little difficulty. A gift to A and the heirs of his body would have been construed along simple and fairly obvious lines. But Bracton immediately vitiates his principle by introducing implied conditions, and consequently the *modus* will not prevail in actual practice, for the law will presume a number of implied conditions which the donor did not express and probably did not contemplate. There is no doubt that in this passage Bracton has had in mind certain portions of Roman law on the matter of conditional gifts. It would be unfair, however, to accuse Bracton of using his Roman learning in a place where it did not belong. If Bracton treated these gifts as conditional it is very probable that he had some grounds for doing so in contemporary opinion. We have already suggested that such an opinion might easily arise in connection with the *maritagium*, for the husband's estate under this arrangement depended to a very large degree upon the birth of issue, and he might very naturally have regarded it as being conditional upon that event. So, too, the donor might likewise have imagined that his gift was in a sense conditional, for it is natural that he should intend the gift to be the foundation of a new family, and if that family did not become established then the gift should revert to the donor. To him, also, the *maritagium* may therefore have looked very much like a gift conditional upon the birth of issue. In view of all this Bracton not unnaturally looked to his Roman books for light

upon the treatment of conditional gifts, for in Bracton's day the English law was evidently very unsettled; the traditional *maritagium* was undergoing numerous variations and donors were devising all sorts of fancy limitations, while many gifts containing limitations of this sort could hardly be described as *maritagia* at all.

Bracton begins his discussion by the somewhat fruitless classification of practically every sort of gift which is not in fee simple as a conditional gift, throwing together in one category the *maritagium*, gifts to religious houses, to bastards, gifts for life, for years and fee farm. This, of course, is not very helpful. He then proceeds to say that the *modus* will control the line of descent and exclude heirs of any class except those named in the *modus*, while upon the failure of the prescribed class of heirs there will be a reversion to the donor, which if it is not expressed in the deed will be based upon an implied condition—which is Bracton's way of saying in Roman terms that as a matter of custom there always has been a reversion in such cases, and that it is part of the legal institution of the *maritagium* and need not be set forth specially in the deed. He then proceeds to develop this curious theory: A gift to A and the heirs of his body by a particular wife (an example of a *maritagium*) gives to A a life estate only until the birth of an heir; upon that event the life estate swells to a fee simple; if the heir predeceases the donee that fee simple will shrink to a life estate. On the other hand a gift to "A and his heirs if he have heirs of his body," once it has become a fee simple upon the birth of an heir, will never shrink to a life estate again on the failure of that heir; the reason for this, it seems, lies in the fact that the former gift must be construed as a *maritagium* whose aim is to endow an enduring family, while the second is expressly conditional. Consequently the eventual failure of issue in the case of a *maritagium* reduces the donee's estate to a life interest, thereby assuring the reversion after the death of the wife and of the husband (who will be entitled to a sort of curtesy even although the issue has failed).

Bracton's most striking remarks are on the subject of the alienability of the *maritagium*. The donee has only a life estate until issue is born; but then—

"if heirs of the prescribed class are born, they only are called to the

succession; and if the feoffee has alienated to someone else, that alienation is good and his heirs will be bound to warrant, since they can claim nothing save by succession and descent from their parents—although some people think that they were enfeoffed at the same time as their parents, which is not true." [1]

It certainly seems that Bracton here lets technical rules defeat the *modus* whose power he so highly praised on this very page, for he uses the rule that "heirs" is a word of limitation to enable the donee to alienate so as to disinherit the heirs. This clearly defeats the intention of the donor and flouts the *modus*. Bracton's Romanism is not to blame, for it is clear that his learned language is expressing a rule of contemporary English law. At the moment he was writing, the insurgent barons had drawn up a list of grievances, and in this document (called the Petition of the Barons, 1258) we have this complaint:

"The barons pray remedy concerning the alienation of *maritagia* in such cases as this: If one give a caruecate of land with his daughter or sister in marriage to have and to hold to them and the heirs issuing of the said daughter or sister in such wise that if the said daughter or sister die without heir of her body the land shall wholly revert to the donor or his heirs, although the said gift is not absolute but conditional, yet women after the death of their husbands give or sell the said *maritagium* during their widowhood and make feoffments thereof at their will although they have no heirs of their body, nor have such feoffments so far been in any way revocable (by the donor). Wherefore the barons pray remedy that out of the equity of the law there be provided a remedy to recall such feoffments by reason of the said condition either by a writ of entry or in some other competent manner and that in such cases there should be judgment for the demandent."

From this it will be seen that the barons' protest was against the rule which allows the donee (who by this time was often the woman as well as the man) to alienate in spite of the failure of issue. Their suggestion of a writ of entry clearly refers to the writ of entry in the *quibus* whereby a reversioner could recover land against the alienee of a tenant for life. The barons had to wait nearly a generation before they got their remedy.

The Statute *De Donis*, which is the first chapter of the Statute of Westminster II (1285), examines the whole situation and makes the following provisions: The reversioner can secure his reversion by a writ of formedon in the reverter. There is some

1 Bracton, f. 17 b (text of 1569).

reason to believe that a remedy such as this already existed before the statute (although perhaps only as a matter of favor and not of common right), but it will be noticed that the demand of the barons for a writ of entry which would give them a forfeiture was not granted. The reversioner can only bring his writ when the reversion takes effect. Next, the statute gives a writ of formedon in the descender which can be brought to secure the descent in the entail; this was a "new remedy for a new case." Of remainders it says nothing, although it may be noted that the statute uses the word "remain" in the sense of descend. The statute observes:

"In a case where a tenement was given to a donee and the heirs of his body, it has always seemed hard to donors and their heirs that the intention expressed in the gift so far has not been observed for in all such cases after the birth of issue to the donee of such a conditional gift, the donees have so far had the power of alienating the tenement and disinheriting their issue against the will of the donors and against the express form of the gift; and moreover whereas on the failure of issue a tenement so given ought to revert to the donor or his heir according to the expressed form of the gift, nevertheless donors have been thus far excluded from the reversion on account of the deed and feoffment of the donee—which is manifestly against the form of the gift.

"Wherefore our lord the King perceiving how necessary and useful it is to appoint a remedy in the aforesaid case, has established that the will of the donor according to the form manifestly expressed in the Charter shall henceforth be observed, in such wise that those to whom a tenement is thus given upon condition shall not have power of alienating it and preventing it from remaining to their issue after their death, or else to the donor or his heir if issue shall fail, either by reason that there was no issue at all or that it had failed."[1]

The statute, therefore, definitely puts an end to the doctrine that a *maritagium* or other gift to a limited class of heirs can be alienated away from such heirs on the ground that an implied condition has been fulfilled and the conditional gift converted into a fee simple. Henceforward the issue of the donee of the class specified in the gift is assured of taking, and failing such issue the donor is assured of his reversion.

An examination of the use of the word "issue" in the statute will show that its meaning was not an indefinitely long line of descendants of the prescribed class, but only the first generation;

[1] Stat. Westminster II, c. 1; Pound and Plucknett, *Readings*, 658–660.

this is clear for the statute speaks of "issue or the issue of such issue." [1] It therefore follows that the statute only assures the inheritance to the issue of the donee, that is to say, his heir in the first generation. The statute imposes no restraint upon an alienation by the issue. This point was raised in 1311 when the famous Chief Justice Bereford admitted that this was the literal meaning of the statute, "but," he said—

"he that made the statute meant to bind the issue in fee tail as well as the feoffees until the tail had reached the fourth degree, and it was only through negligence that he omitted to insert express words to that effect in the statute; therefore we shall not abate this writ." [2]

According to another report of the same case Bereford's words were these:

"Herle. That case was one of free marriage and in naught similar to the present one.

"Bereford, J. I take the law to be the same in both cases, for in both cases the tail continueth until after the fourth degree; and you are to know that we will not abate the writ in these circumstances."

From this passage we can clearly see the state of affairs in 1312. The Statute *De Donis* had been in operation for a quarter of a century and it is not surprising to find that so distinguished a lawyer as Herle (who afterwards became Chief Justice of the Common Pleas) should venture the opinion that there were now two forms of gift less than a fee simple, the *maritagium* and the fee tail. It is just as significant, however, that Bereford indicates the historical relationship between the two. So strong does he feel that connection to be that he applies to the estate tail (which by now is beginning to be regarded as the creation of the Statute *De Donis*) a characteristic which was once peculiar to the *maritagium*. Back in Glanvill's day a gift in free marriage remained free until the third heir had entered, and this in the canonical way of counting was the fourth degree. Bereford applies and extends this rule; the fee tail like the *maritagium* retains its peculiar characteristics until the third heir (or the fourth degree) enters. As we have already observed, Glanvill does not tell us expressly that the *maritagium* in his day was

1 See Updegraff, *The Interpretation of "Issue" in De Donis*, 39 Harvard Law Review, 200–220.

2 2 *Y. B. 5 Edw. II* (Selden Soc.), i. 176; ii. 225.

inalienable, but we may well believe that in practice it was rarely, if ever, disposed of.

So far, then, we have traced the evolution of the estate tail from the ancient *maritagium;* we have also seen that the attempts to distinguish between the two were not altogether successful, and that notions appropriate to the *maritagium* continued to be applied to the estate tail. A later statement of the distinction between the two estates as they existed before the statute was this:

"The difference between formedon (an entail) and frank marriage is that in a gift in frank marriage the reversion is always saved and supposed, but in a gift in tail the reversion is not saved unless it is expressly saved in the charter." [1]

The distinction drawn is only explicable in the light of Bracton's discussion, and when the two are compared this passage brings striking confirmation to the opinion we have expressed above, namely, that a legally protected reversion first appeared in connection with *maritagium.* All other conditional gifts (for example, gifts "to A and the heirs of his body") were converted into fee simple upon the birth of issue, whereupon the donee could alienate and defeat the reversion. That was the rule as given by Bracton, and it is identically the same as the one in the case we have quoted, where it was applied to a gift which had been alienated by the donee before the Statute of *De Donis* was passed, and which, therefore, was expressly saved from the operation of the statute.

The legal preservation of the reversion in entails is therefore due to the operation of *De Donis* which deliberately imitated the older *maritagium.* When we come to the other aspects of the estate tail the development is the same but with a difference. Just as the free *maritagium* retained its characteristics for four degrees, so Chief Justice Bereford proposed, and indeed adjudged, that an estate tail was inalienable during the same period. True, the statute did not say this, but Bereford had a ready explanation. Chief Justice Hengham who drew the statute had done it carelessly; as he worded it the entail only lasted two degrees, but his intention was to make it last for four. This information Bereford, no doubt, derived from tradition, and there was no rule at

[1] *Year Books 30 & 31, Edw. I* (1303), 384; cf. *ibid.*, 250.

that time to prevent him from setting aside the clear words of a statute when he had private information that the draftsman really meant something else. It is curious to observe that one of the greatest pillars of real property law had been erected so carelessly. Bereford's exposition of the statute, like many others of his striking contributions to the law, was not followed, and in the middle of the fourteenth century it was still an open question how long an entail was inalienable—the real test of Bereford's doctrine could not, of course, be made for some time, for four degrees would normally last nearly a century. Indeed, in 1344 it was not even certain that an entail would last even as long as four degrees—a very long discussion on this point was conclusive.[1] As to what happened after the fourth degree we have no indication until the year 1410 when we are told[2] that "after the fourth degree frank marriage becomes formedon"—in other words, it is already the doctrine that an entail will endure as long as there are heirs of the prescribed class, and this doctrine is now transferred to the *maritagium* so that the *maritagium* now becomes of indefinite duration.

In discussing Bracton, we have seen that his difficulty was due to the application to entails of the doctrine that the word "heirs" is a word of limitation and not of purchase. This doctrine left no basis for the expectation of the heir in tail until the Statute *De Donis* gave him a legal estate and a form of action for its protection. This statutory reform, however, made it difficult to retain Bracton's dogma; as things stood after the statute a gift to A and the heirs of his body gave to the heir an interest which was protected by the writ of formedon in the descender; how, then, could it be said that the heir takes nothing by purchase? An examination of the attempts to resolve this difficulty would yield interesting results which we can only briefly indicate here. The question was raised in this way. When a tenant for life was defendant in an action where the title to the fee simple was in dispute, he was unable to proceed alone. The proper thing for him to do was to "pray aid of the reversioner in whom the fee resides" in order that the reversioner could come and defend his own title. It sometimes happened, however, that there was

1 *Year Books 18 & 19, Edw. III*, (1344), 201.
2 *Year Book 12 Hen. IV.*

collusion between the plaintiff and the tenant for life, in consequence of which the tenant for life omitted to pray aid of the reversioner and instead defaulted or "pleaded faintly" so as to allow the plaintiff to recover by judgment. In order to prevent the reversioner losing his rights through the dishonesty of his tenant for life in refusing to pray aid of him, a number of rules were evolved, many of them statutory, which allowed the reversioner to intervene and "pray to be received to defend his right." It is in cases of these two sorts, aid and receipt, that we find some curious speculations as to the nature of a fee tail. In 1311 we have a case on these facts: tenements were given in frank marriage, and the husband (who had survived his wife) attempted to alienate them fraudulently by having his alienee bring an action against him which he suffered to go by default. The heir intervened and prayed to be received, and his prayer was granted. Without going into details it is nevertheless obvious that this decision depends upon the view that an entail, where the donee is in possession and has an heir apparent, is substantially a life tenancy for the donee while the heir apparent is treated as having the fee.[1] A few years earlier in 1307 we have the same argument:[2] Agnes, widow of Thomas Picot, was the surviving donee in tail, and upon her default in a real action her son and heir prayed receipt on the ground that his mother had only a freehold. Here also his prayer for receipt was granted.[3] Shortly afterwards in 1314 we get a formal theory of the entail announced by Serjeant Toudeby in these words: "In the case where tenements are granted in fee tail and the grantee has issue, the fee is severed from the freehold, and the fee is in the issue while the freehold only is in the father."[4] If this remarkable theory had prevailed long enough to combine with the development of the idea that an entail endured indefinitely as long as there were heirs, the law would have had a very different aspect, for a tenant in tail in possession would always be a life tenant only, while his heir apparent held a fee—the books do not venture to say, however, that this would

[1] *Y. B. 5 Edw. II*, i. 160. It will be noticed that in the early fourteenth century there was no objection to speaking of the "heir" of a living person.

[2] *Y. B. 33 & 35, Edw. I*, 496.

[3] In both these cases the situation was somewhat special, as the "heir" was indicated with some certainty, since one of the two donees was dead, and there was, therefore, no possibility of any further issue of the prescribed class.

[4] 3 Eyre of Kent (Selden Soc.) 44.

be a fee simple. By the middle of the fourteenth century this doctrine is extinct. Perhaps it was felt that if even the issue in tail had a fee, it would be difficult to describe what the reversioner had. From the middle of the fourteenth century onwards we can clearly see the growth of the dogmas which are to be fixed in the middle of the fifteenth century in the great treatise of Littleton where we find the classical doctrine, and can appreciate the length of time which separates it from the desperate attempt of Bracton to maintain that the *maritagium* and similar so-called conditional gifts were no more than fees simple subject to a peculiar line of descent or to a condition as to the birth of issue. Attempts to identify the fee tail and the fee simple had failed, whether they be Bracton's attempt to place the fee in the donee or Toudeby's attempt to place it in the issue, and the inevitable conclusion was at last reached that an entail in fact divides the fee among different people. The use of the word "tail" curiously illustrates this. Coke and all the old books are correct when they say that it is derived from the French verb *tailler* which means "to carve." But this word "carve" has two senses. In the first place it may mean to give a particular shape to a thing as an artist does to marble: this was the original meaning of the fee tail, for the descent of the fee was limited to preordained lines. But in the view of Coke, *tailler* takes the second sense of the word "carve," for to him a fee tail consists of a fee which is cut up and partitioned among the various parties to the entail: in Coke's thought to carve an entail was analogous to carving a joint—a certain amount is cut off and a certain amount is left; adding them together we have exactly one fee simple.

CHAPTER VII

THE COMMON LAW ESTATES

Of the fee simple we have already spoken, and so it remains only to say a few words upon the remaining common law estates,[1] and first, of the reversion. In Coke's words "a reversion is where the residue of the estate doth always continue in him that made the particular estate." Applying to ancient cases the doctrines of his own time, Coke, and following him Challis, set forth the proposition that there could be no reversion after a conditional fee. This is completely erroneous. *De Donis* expressly tells us that there was already a writ to secure reversions, and there are cases on the Plea Rolls to confirm this. The result of the statute was, however, to strengthen the position of the reversioner very considerably by providing that the donee's alienation should no longer be a bar to such an action, while at the same moment that *De Donis* was passed, another portion of the Statute of Westminster II clarified the law of receipt in favor of the reversioner (c. 3).

Estates in remainder were much longer in acquiring a definite legal standing. Here, again, the modern student must beware of the deduction on theoretical grounds by Challis that there could be no remainder after a conditional fee. This deduction is based upon the view that a conditional fee before the Statute *De Donis* was in fact a fee simple conditional; this is taking Bracton too seriously, and Maitland easily showed from surviving documents that about one half of the conditional fees of which we have record contain remainders limited after them. It is, of course, to the *maritagium* that we must look for our earliest indications. In the year 1220 we find a case involving a *maritagium* in these terms: Geoffrey had two sisters, Beatrice and Matilda, and gave land in *maritagium* with Beatrice to Reginald fitz Ursy with this covenant, that if the said Beatrice should die without heir

[1] The following articles deserve careful study: Elphinstone, *Notes on the Alienation of Estates Tail*, 6 Law Quarterly Review, 280; Maitland, *Remainders after Conditional Fees*, 6 *ibid.*, 22.

of her body, or if her heirs should die without heir of their body, the land should revert (*sic*) to the said Matilda and her heirs.[1] Unfortunately, the decision in this case was made upon a point of pleading and so we do not get a full discussion of this "covenant." It will be seen, however, that it is a clear example of a gift in tail to the one sister with the remainder in fee to the other. The fact that the word "revert" is used instead of "remain" is of little consequence, for the use of these words was far from settled. Bracton tells us that there is a writ for the use of remaindermen and that he will give us its form; but he does not do so, and it may be that Bracton thought there ought to be a writ but could not find one. As we have already noticed, the Statute *De Donis* does not say anything about remainders although it uses the word "remain" in the senses of descend and revert. Consequently the position of the remainderman was always less secure than that of the reversioner. In 1345 a remainderman in fee prayed receipt upon default of a tenant for life, and a long discussion, no doubt heated, concluded with the oft-quoted words:

"R. Thorpe: I think you will do as others have done in the same case, or else we do not know what the law is.

"Hilary, J.: It is the will of the justices.

"Stonore, J.: No, law is reason."

In this case it was held by the court that the remainderman was receivable, but it is significant how vigorously this opinion was contested considering that it is the simplest possible case in which the question could be raised.[2]

A few words must be said about contingent remainders. The very earliest examples seem to have aroused little comment; for example, a fine (a particularly solemn form of conveyance) was drawn in this form according to a *Year Book* of 1304.:[3]

"He granted and rendered the same tenements to the aforesaid man and his wife, to have and to hold to them, and to the heirs of their bodies begotten, and if they died without such heirs the tenements should remain to the right heirs of the man.—This, however, is strange seeing that the remainder was not granted to any certain person."

1 Bracton's *Note Book*, 86.

2 *Y. B. 18 & 19 Edw. III*, 374. It was strongly contended that a remainder could entitle to receipt if it were created by fine.

3 *Y. B. 32 & 33, Edw. I*, 328.

In 1309 we get another fine which the *Year Book* reports thus:[1]

"B grants the tenements to Robert and renders them to him in this court, to have and to hold to Robert for his whole life of the chief lord of the fee; and after the decease of Robert the tenements are to remain to C and the heirs of his body begotten, to hold of the chief lord of the fee; and if C die without heir of his body, the tenements are to remain to the right heirs of Robert to hold of the chief lord of the fee.

"Bereford, J., asked who was to do homage."

In both of these cases it must be remembered that the rule in *Shelley's Case* was not yet in existence, and so we have in both cases in the beginning of the fourteenth century a feudal difficulty which will weigh heavily upon contingent remainders: when the remainder in fee is contingent, who is the person to do the feudal services pertaining to a fee simple? Whatever arrangement the tenant may make, it must not destroy the right of the lord to have some certain tenant all the time who will be responsible to him for the feudal services. A very curious case occurred in 1336.[2] Lands were granted by fine to Osbern and Florence his wife for life, remainder to Geoffrey his son in tail, remainder to Austin, the brother of Geoffrey in tail, remainder to the right heirs of Osbern. These remainders were attacked on the ground that at the time the fine was levied Osbern had no children, and that it was only after the fine that Osbern and Florence achieved the requisite two sons to take the names assigned to them in the fine. Later still in 1389 a party brought detinue to obtain possession of a charter, alleging that he was entitled to the land to which the charter referred.[3] It appeared that one W. gave the land to A. C. in tail, the remainder to the right heirs of A. S.; A. C. enfeoffed one B. with warranty and his executor (after his death without heir) gave W.'s charter to B. as a document of title. A. S. is also dead, and the plaintiff is suing as his right heir. Cherlton observed: "You think that although A. S. was alive when the remainder was limited yet since he was dead when the remainder fell in and had a right heir, that therefore the remainder is good." The plaintiff was unsuccessful but we are not told why. The case is probably not inconsistent with the

[1] *Y. B. 2 & 3. dw. II*, 4.
[2] *Y. B. 10 Edw. III*, Michs. no. 8.
[3] *Detinue* 46.

view which is to be found in other cases that if a contingent remainder in the course of circumstances subsequently becomes vested then it is good enough.

It was during the sixteenth century that the problem of contingent remainders began to appear frequently before the courts. It has been suggested that the cause of this was partly political uncertainty, and partly the rapid increase in wealth of the landed classes which was a temptation to try various forms of settlement which would place family fortunes beyond the control of the settlor's heirs. In one form or another contingent remainders were apt to play a part in these devices. In the earlier part of the century the courts were prepared to protect a few types of contingent remainder, but as the century proceeded it became increasingly clear that a larger problem was involved, namely, whether the courts should permit the creation of an unbarrable entail, which in the sixteenth century was loosely called a "perpetuity." To defeat these attempts, the court made great use first of the old common law rule that there must be no interruption between the end of one estate and the commencement of the next. In this way a number of contingent remainders could be invalidated until the invention in the seventeenth century of trustees to preserve them. Similarly, the old rules of seisin were rigidly adhered to, and great use was made of the principle that a tenant in tail or a tenant for life can create a tortious fee simple which had the effect of destroying contingent remainders; so, too, the complicated rules of merger. In 1589 we come to the famous *Chudleigh's Case* which decided that all contingent remainders were destructible under one or the other of these rules. Similarly a number of executory interests were treated by the common law courts as contingent remainders, and therefore destructible.

With the early years of the seventeenth century it began to be felt that this policy had gone too far. Various decisions during the seventeenth and eighteenth centuries uphold the device of interposing trustees to preserve contingent remainders, in spite of powerful arguments that the estate of the trustees themselves was only contingent, and it seems clear that expediency played a large part in reaching these decisions. At the beginning of the nineteenth century there was incessant legislation affecting real

property law, and for a year (1844–1845) contingent remainders were abolished. When they were restored the legislature followed the practice established by conveyancers and rendered it no longer necessary to go through the formality of interposing trustees for the preservation of contingent remainders. Meanwhile, all through the eighteenth century Chancery was endeavoring to treat them as something more than a mere possibility, and so allowed them to be devisable and assignable.

In spite of Bracton's doctrine attempts were still made from time to time to use the word "heirs" as a word of purchase. We shall see this in the history of the entail, while here we may note a series of cases which anticipate by two hundred years the famous rule in *Shelley's Case*. In the reign of Edward II a few obscure references occur and in the reign of Edward III we find some clear discussions of the problem involved. Thus in 1350 we find that lands were conveyed by fine to D. for life, remainder to K. for life if she survived D., remainder to the right heirs of D. After the death of D. and during K.'s lifetime the heir of D. alienated for a fee simple, and his alienee brought a writ of *quid juris clamat* against K. to compel her to attourn. In the course of the discussion, Willowby, J., observed that "according to some people, when the fee is limited to the right heirs of a certain person then the fee is in the ancestor." To this proposition Serjeant Seton agreed, but the *Year Book* reporter tells us that he is uncertain as to what the outcome of the case was.[1] Again, in 1366 a case arose upon the following facts:[2] Land was given to J. for life, remainder in special tail to his son, remainder in fee to the right heirs of J. After the death of the life tenant and the extinction of the entail Richard Sutton, the brother of J., entered as the right heir. Thereupon the provost of Beverley distrained Richard to compel him to pay relief which would be due if Richard entered as heir, but not if he entered as purchaser; this discussion took place:

"*Cavendish.* If the lease was made to your father for life with remainder to his right heirs then the father had the fee . . . and if you were under age the lord would have wardship and consequently relief.

[1] *Y. B. 24 Edw. III*, Michs. no. 79.
[2] *Y. B. 40 Edw. III*, Hil. no. 18.

"*Finchden.* He cannot avow upon us for relief as heir of the tenant in special tail, because we are not in as his heir.

"*Thorpe, C. J.* I know very well what you want to say. You have pleaded that you ought not to have to pay relief since you are in as purchaser, being the first in whom the remainder takes effect according to the words of the deed; but you are in as heir to your father . . . and the remainder was not entailed to you by your proper name but under the description of heir; and so it was awarded by all the justices that the lord should have return of the distress."

From this it is clear that there is very strong mediæval precedent for the rule in *Shelley's Case,* and that the foundation of it was the hardship which would otherwise ensue to lords if their tenants were allowed to make deeds limiting remainders to their heirs, and the heirs were allowed to enter as purchasers. This rule, therefore, like many others, once had a perfectly rational basis while feudalism lasted in protecting lords against serious loss through conveyances of this kind, which in those days would have seemed almost fraudulent.

We now come to the estate for life. Maitland regarded it as the most primitive interest in land and as typical of the age before alienation became free, when the estate for life was the fullest form of ownership then recognized. Consequently until modern statutes changed it a gift of land to A gave him only a life estate. All through the middle ages and later still the legal powers of a tenant for life were considerable and they have been regarded as relics of a still greater importance in time past. Thus he represents the land for the purpose of litigation; it has been suggested that at first he was not liable for waste, although the royal courts finally intervened first with a prohibition as a matter of grace and favor, and later with a form of action; then, too, the tenant for life was protected by the powerful machinery of the petty assizes which results from the important dogma that a tenant for life is seised of a free tenement, and this makes him a freeholder—indeed the word "freehold" came to mean a life estate. The tenant for life as a freeholder has a big place in public law and an assured constitutional position.

The tendency of the law is to increase the restrictions upon tenants for life. This became necessary in an endeavor to preserve the interests of reversioners against collusive recoveries suffered by tenants for life. So, also, in the matter of waste.

Some legislation and a good deal of case law contributed to this result. An interesting feature of the life tenancy is its division into two social classes: first there is a lessee for life, who will be a farmer or a yeoman, while on the other hand there will be the tenant for life under a settlement. At first these represent merely social distinctions, but it was inevitable that the legal position of the two should finally become differentiated. The distinction already appears in the pages of Bracton who denies that the *firmarius* (farmer or lessee for life) is seised of a free tenement. In the course of the eighteenth century this distinction was sanctioned by the legislature, and later still it became necessary to explain that the powers given to tenants for life under the Settled Land Acts could not be exercised by a lessee for life.

We now come to dower, whose early history is singularly obscure. Ancient forms insist that it is a voluntary gift of a portion of his property made by the husband to the wife. The gift might take place at the time of the marriage, although in some cases on the continent we find dower constituted many years after the marriage. The royal courts only recognized dower which was constituted at the church door, that is to say, at the moment of the solemnization of the marriage. Informal or clandestine marriages did not confer legal protection upon dower constituted on such informal occasions, for the marriage must be "solemnized"—although it would seem there was no need for the nuptial Mass. In this we see very clearly the hand of the Church which was fighting a hard battle to make marriage a precise, definite and public ceremony. In England, the King's Court refused to recognize dower constituted at any moment save at the marriage ceremony.

This is, generally speaking, the position of dower down to the time of Bracton. Shortly afterwards most important changes took place whose progress has not been traced. Under the new order dower consists of one third of the land held by the husband at the time the marriage was made unless he has specified less. By the time of Edward I dower attaches to lands acquired by the husband subsequent to the marriage while an endowment of less than one third ceased to be a bar to a widow's demand of a full third. In this way dower ceases to be a gift and becomes an estate. If the husband alienated after the marriage the widow

could recover one third and this is protected by statute against the husband's warranty and against a collusive recovery, although it had long been possible to convey free of dower by fine, if the wife came into court and expressed her assent to it.

With the close of the middle ages the increasing efficiency of settlements made dower less important and the rule appears in the Statute of Uses that a jointure will bar dower; at the same time equity refused dower out of a use, and the eighteenth-century Chancellors would not allow dower out of a trust. Since the Dower Act in England, dower has ceased to be of practical importance, but that policy has not been adopted in many parts of this country. Throughout the history of the common law the widow's interest was for life only; but in some customs on the continent dower was not merely for life but absolute, and so it sometimes played a part in the development of the institution of community.

We now come to curtesy, which is the husband's right to hold for the remainder of his life the lands of his wife after her decease, if issue has been born alive, although it is not necessary that it should survive. Glanvill tells us that this curious rule is the custom of the realm; Bracton calls it "tenancy by the law of England," while in the earliest *Year Book* it is described as "the curtesy of England," which, as Maitland suggests, may be a name applied to it by appreciative husbands. In Normandy such a right only lasted until remarriage, but in England curtesy even went so far as to allow a second husband's curtesy to postpone the entry of an heir by the first husband, which might thus defeat the lord's wardship. There is an old tradition, so far unconfirmed, that curtesy owed its origin, or at least its more striking features, to a royal concession. In its origin it seems to have developed from a wardship, first over the wife and next over the children.

"To this, so we think, points the requirement that a child capable of inheriting from the wife shall be born—born and heard to cry within the four walls. This quaint demand for a cry within the four walls is explained to us in Edward I's day as a demand for the testimony of males—the males who are not permitted to enter the chamber where the wife lies, but stand outside listening for the wail which will give the husband his curtesy. In many systems of marital law the birth of a child, even though its speedy death follows, has important consequences

for husband and wife; sometimes, for example, the 'community of goods' between husband and wife begins, not with the marriage, but with the birth of the first-born. These rules will send back our thoughts to a time when the sterile wife may be divorced, and no marriage is stable until a child is born."[1]

A good deal of legislation from Edward I's reign was necessary to prevent the abuse of curtesy rights, and the *Year Books* contain a good many cases where the husbands attempted to exceed their powers in dealing with their wives' lands. In equity a husband could have curtesy out of his wife's separate uses, which, however, she could easily defeat, and modern legislation giving married women control over their separate property has reduced curtesy to a minimum.

The term of years had a long and peculiar history. In the early days of the common law the position of the termor was remarkably weak. In the early thirteenth century his only remedy was an action of covenant against the lessor, which was in effect an action for specific performance. As against strangers the termor had no protection, and so had to content himself with enforcing an express warranty of quiet possession against his lessor. Later such a covenant will be implied. The limitations of a term of years were numerous; if the lessor died leaving an infant heir the term was suspended until the heir came of age, when the term was resumed; the lessor's widow was entitled to one third of the tenement for life as dower, and so the term had to be lengthened to compensate; again, if the lessor alienated he could (for a time) convey free of the term.

About the year 1235 the great Judge Raleigh invented a new form of action called *quare ejecit infra terminum* which Bracton assures us was meant to protect the termor against all disturbers and to give him the recovery of his term. This action would therefore be equivalent to an assize of *novel disseisin*. This remedy, however, was too drastic and seems almost immediately to have been reduced to an action against those only who claimed under the feoffment from the original lessor. If the lessor's feoffment would not henceforth defeat a term, there were still other methods available, and until the Statute of Gloucester, c. 11 (1278), it was possible by means of a collusive recovery to free

[1] 2 Pollock and Maitland, 418.

of the term; under the statute the termor was now allowed receipt. Meanwhile the termor acquired another remedy. This was an action of trespass *de ejectione firmæ* which by the time of Edward II was available against all disturbers, but this time the termor only got damages and not the recovery of his term.

In order to explain this curious history we shall have to examine the function which the term of years performed in the thirteenth century economic system. The great problem, of course, is why the termor is not protected by the petty assizes. It is certainly not because the term of years was only held by unimportant people; bishops, monasteries and great lords are to be found holding terms of years. Nor can it be said that a term of years was non-feudal, for there was little appreciable difference between a life estate which did fealty only and a term of years. Indeed, as a result of the real remedies devised by Raleigh and extended by the Statute of Gloucester it was clear that the lessee had a tenement, and in Raleigh's own day it was said that he was seised; but the great distinction was that although the termor was seised of a tenement, yet he was not seised of a *free* tenement, which alone would entitle him to protection by the petty assizes.[1] Why, then, is a term of years not treated as a free tenement? Maitland's solution ascribed this to the influence of Roman law which would reduce the term of years to an usufruct.

"In an evil hour the English judges, who were controlling a new possessory action, which had been suggested by foreign models, adopted this theory at the expense of the termor. He must be the *conductor* who does not possess, or he must be the usufructuary who does not possess the land but has '*quasi*-possession' of a servitude. But they cannot go through with their theory. In less than a century it has broken down. The termor gets his possessory action; but it is a new action. He is 'seised,' but he is not 'seised of free tenement,' for he cannot bring an assize. At a somewhat later time he is not 'seised' but is 'possessed.' English law for six centuries and more will rue this youthful flirtation with Romanism." [2]

Against this theory must be placed the important criticisms of Joüon des Longrais who first of all establishes the economic history of the term of years.[3] The term was used for purposes

1 See Challis, *Are Leaseholds Tenements?* 6 Law Quarterly Review, 69.
2 2 Pollock and Maitland, 115.
3 1 Joüon des Longrais, 141–148.

which were immoral and speculative, largely to avoid the Church's prohibition of usury. It seems that the principal object of the term of years was to enable money to be lent on the security of land at considerable profit to the lender. A capitalist would give to an embarrassed landowner a sum of money down; in return he took a term of years sufficiently long to enable him to recover the capital, together with his profits, out of the revenues of the land. On the face of it this transaction was merely the grant of a lease in return for a lump sum and technically it would seem to avoid the objection of usury. The termor, therefore, is not unnaturally placed in popular literature in very bad company among usurers and other scoundrels who prey upon society. A termor was no doubt seised in Bracton's day, but there was every reason for not calling his tenement a free tenement. Joüon des Longrais has shown that the free tenement of which the estates for life, in dower, by curtesy, in tail, or in fee simple are examples, is a very different thing. The free tenement which the petty assizes protected consists of "family property which is up to a point permanent, productive of revenue." The essence of the free tenement is that it should be the permanent and normal economic basis of the family. Herein lies the importance of giving it full and speedy protection, and for this purpose the petty assizes were invented. Contrasted with the free tenements the estate of the termor is merely a speculative arrangement calculated to evade the law against usury. The arrangement is made between a grasping speculator on the one hand, and on the other a man whose difficulties temporarily compel him to part with his patrimony—and it must be remembered that during the middle ages a very wealthy landowner would usually find it difficult to produce quite a small sum of money at short notice. There was therefore no reason whatever for protecting the termor by those assizes whose object was to fortify the family and its means of subsistence against wrongdoers of another type. Viewed in this light there is ample explanation for the refusal of the common law to allow the termor to use the assizes.

"The object of the assizes is to protect the real property of the family which is the source of a constant revenue assuring the maintenance of a person at least for his whole life, all of which is implied in the words

'seisin of a free tenement;' but the tenure of land by lease for a few years has none of these characteristics." [1]

Here as in a number of other cases we have to take account of the results of the Black Death and the economic revolution which followed it. One of these results was certainly an increased number of people in the free labor market who to some extent replaced the loss of villeins caused by death and desertion. In many cases these free laborers took their lands under leases for terms of years and so from the middle of the fourteenth century we find the rise of the husbandry release as it exists to-day in England. At the same time other and more effective methods were devised for rendering land a security for debt, and so the termor was no longer associated with the worst aspects of money lending. For the future the termor will be regularly a freeman whose capital is insufficient to purchase much land, although he is active and enterprising enough to work the land of other owners. At this moment there was a tendency for the quantity of land under cultivation to increase somewhat since a good deal of waste was being reclaimed; such reclaimed land was frequently let out on lease. Small landowners of the yeoman class also seem to have found it often desirable to take an additional quantity of land under lease. The termor is therefore in every way deserving of the law's protection. In the fifteenth century attempts were made to use the action of trespass *de ejectione* in such a way that it would give recovery of the term. In 1455 the court stated that this was impossible and that damages only were obtainable. In 1466 and again in 1482 we find the opinion (although not a decision) that this action might give recovery of the term; in 1499 we get the first clear decision to that effect. The termor was very slow in getting a real action but in the end he got the most useful and practical of all the real actions. While freeholders had to be content with assizes and writs of entry, the termor could recover his term by the swift and simple action of trespass. So great an advantage was this that freeholders began to try to secure the same advantage. Finally they succeeded by means of the device called the action of ejectment.[2] In this way a good deal could be done without resorting to the older forms of

1 1 Joüon des Longrais, 143.

2 See above, pp. 282, 367.

action. This development took place during the sixteenth century and the finishing touches to the edifice of fiction were the work of Lord Chief Justice Rolle during the Commonwealth, but already at the beginning of the seventeenth century the action was so commonly used that Coke lamented the fact that the old real actions were becoming very rare. And so by a curious twist of history, the freeholder was glad in the end to avail himself of remedies originally designed for the protection of the humble termor.

CHAPTER VIII

USES AND TRUSTS

English lawyers are apt to believe that the use, and later the trust, are the peculiar inventions of English law. It is perfectly true that they were developed independently and along original lines, but it is interesting to observe that other legal systems have reached something like the same result by a different road. As early as the Salic Law in the fifth century we find the *salman* whose position partly resembles that of a trustee and partly that of an executor, but it is in Mohammedan law of the present day that we find a most striking resemblance to the trust in an alien system.

> "In the wakf they invented a legal concept which equals if not excels in originality and practical utility the Anglican trust; it combines the ideas of trust, family entail, and charitable foundation. The grantor transfers the bare legal title to God and appoints an administrator to manage the property for the beneficiary; thus there are four parties to the transaction. This expedient has proved so flexible and so popular that in the Ottoman Empire three fourths of the city lands were held by this tenure." [1]

As for the origins of the English use, several suggestions have been made and for a long time the favorite was to see it in some aspect of Roman law, either the *ususfructus* or the *fideicommissum*. It is now possible to state with some certainty that neither of these two institutions has any practical bearing upon the development of the English use. As Mr. Justice Holmes observes, the existence of the *salman* in the Salic Law is a sufficient indication that Germanic law was capable of developing from its own resources the idea of a feoffee to use.

The English word "use" is in fact derived not from the Latin *usus* but from *opus*. It first occurs, as might be expected, in connections which are informal and non-technical. The Latin phrase *ad opus* occurs as early as Merovingian times in France and appears in England in the ninth century, where it is used to

[1] 2 Wigmore, *Panorama of Legal History*, 565.

express the purpose of a gift or the object to which it is to be devoted. In this connection it must be observed that chattels as well as land could be held by one person to the use of another, and that in some cases the beneficiary had a remedy at common law by detinue or debt, and in the case of money by the action of account. These, therefore, were personal actions and we had no personal actions for land; consequently in enforcing uses of land the common law did not have the necessary machinery for acting *in personam*. Besides this the common law seems to have adopted the policy of discouraging attempts to separate the enjoyment of land from the legal title, and for this attitude there was some justification; land was the basis of numerous public burdens as well as the source of those numerous and valuable feudal incidents which we have had occasion to mention so often. The interposition of feoffees to uses between the beneficiary and his feudal lord would introduce endless complications into the feudal incidents and might, indeed, completely destroy them—and as we have seen on more than one occasion the common law was determined to maintain these incidents to the best of its ability.

Nevertheless, circumstances combined to promote the development of the use. The Crusades drew a large number of landowners from their homes to distant parts leaving their affairs in the greatest uncertainty, and we find frequent examples of crusaders before their departure for the Holy Land conveying their lands to a friend upon various conditions which are usually cast in the form of a use. So, too, religious houses, following a practice which was common in every type of financial administration, would appropriate regular sources of revenue to specific purposes. When we come to the time of Bracton we find that he regards several of these questions as open to discussion. He even suggests that by means of the use land could be made devisable—and this undoubtedly was a very important factor in the development of the use. It seems, however, that by the time of Edward I this question was closed and it was only in the fourteenth century that it was re-opened in connection with the controversy whether the Franciscan Friars were entitled to hold property by the rule of their order. As early as 1279 the papacy decided that it was lawful for friars to be the beneficiaries of property held by others to their use, and in other ways which upon the continent effected

a similar result. By the close of the fourteenth century the use of lands must have been somewhat common and in 1402 the Commons in Parliament were praying for a remedy.

"Since rent charges and also feoffments of tenements in demesne are made to dishonest persons by way of confidence to perform the wishes of the grantors and feoffors, which dishonest persons fraudulently grant the said rents to other persons in respect whereof the tenants attorn; and such feoffees also charge the tenements in demesne without the assent of their grantors and feoffors, who have no remedy in such case unless one be ordained by this Parliament." [1]

Already, however, the Council had begun to intervene in such cases; in 1350 we find the first case concerning a use before the Council. From this case it appears that a tax collector, who by virtue of his office was deeply indebted to the Crown, on his deathbed granted his lands, goods, and chattels to one Thomas for the purpose of selling them in order to pay his debts to the Crown. Unfortunately the records of the case are extremely incomplete and all we have is a deposition containing these facts. From other sources it would appear that the matter may have got into the Council as the result of an attempt by his widow to compel the feoffee to hand over the balance of the proceeds after the payment of the debts.

The commonest way of creating a use was by conveying the land to a number of joint tenants; the advantage of this was greater security, since it was less likely that several feoffees would all turn out to be dishonest, while at the same time the rule of survivorship was a great convenience—indeed, in the present day, the only reason for retaining the rule is its usefulness as between trustees. At the same time a joint feoffment eliminated complications due to dower. The uses might be declared at the time of the feoffment by writing or verbally, or it might be agreed that the uses should be those to be declared in the feoffor's will. The fact that the uses might not be declared fully, or even at all, at the time of the feoffment, gave rise to the rule that a gratuitous feoffment in which the feoffor continued in possession presumed a use in favor of the feoffor, and from the reign of Edward IV we find a form doctrine of "resulting" uses. Then, too, a bargain and sale from the reign of Henry

[1] 3 Parl. 511.

VII onwards was taken as implying that the vendor who still remained in possession held to the use of the purchaser, and this rule played a large part in the later development of conveyancing.

It was decided fairly soon that a corporation could not be a feoffee to the use of any other person, largely because the sanction which applied to relationships arising out of uses was the personal process of the Court of Chancery, and this was hardly effective against a corporation which had no body which could be coerced and no soul to be damned in consequence of a breach of confidence. It is clear, however, that a corporation could be a beneficiary or *cestui que use* (he who has the use). The interest of the *cestui que use* at this time strictly followed the corresponding legal estates—a married woman for example, until the seventeenth century, had no separate use, her interest under a use being exactly the same as it would have been in land at common law. It was also a rule at this time that the feoffee must have a fee simple. The reasons for this rule were in a sense feudal, for it was stated in the form that A could not hold to the use of B if there existed tenure between A and B. The existence of tenure was so solemn a fact that the law would not allow even an expressed declaration of use to override it.[1] Thus if A enfeoffs B in fee-tail B will hold of A (for the Statute *Quia Emptores* does not apply to fees tail); the existence of this tenure between A and B is so solemn a matter that the law will not look beyond it, and so the existence of the tenure will prevent A from imposing upon B a use. As the older books put it, A has enfeoffed B to hold to the use of B and any subsequent declaration of use is repugnant and void. A little later we shall see the importance of this rule.

The effects of a feoffment to use were to place the legal title in the feoffees, and consequently they may, and indeed must, defend that legal title. Moreover, the heirs of the feoffees are bound by the use, but not purchasers for value without notice of the use, disseisors, abators, lords taking by escheat, or those who take by a title paramount. The interest of the *cestui que use* is best described as being at first just one more of a large variety of titles, weak or defective in varying ways and to various extents.

[1] For the same reason, a term of years would not support a use according to the common lawyers, although the Chancery allowed them; 4 Holdsworth, 471, 472.

The complication of the common law of real property by the early days of the sixteenth century must have familiarized people with the fact that a good many held by titles which fell short of perfection, and were not so very much the worse for it. There were, indeed, numerous countervailing advantages enjoyed by the *cestui que use*. In the first place he had the valuable privilege of being able to dispose of his land after his death by will, which was impossible in common law except in the case of certain lands which had been subject to the custom of devisability from of old. Then, too, settlements could be drawn with much greater freedom by handling uses than by handling common law estates, which by this time had hardened into an inflexible system. So, too, feoffees could be directed to sell portions of the land to pay the debts of a testator, which was impossible at common law. So, too, there was the advantage of not having to use technical forms, for so long as the intention of the settlor was clear it was unnecessary to be as precise as in defining common law estates. It was soon discovered, also, that the use could be employed in order to secure the benefits of ownership to unincorporated bodies such as guilds, parishes, and so on. And so by the beginning of the sixteenth century—

> "it was a wholly unique form of ownership which the Chancellor had thus developed from a conscientious obligation of a very personal kind. It was not a true *jus in rem* because it was not available against the whole world. There were or might be many persons as against whom it could not be asserted. Then although it rested on the Chancellor's power to proceed against the person whose conscience was affected by notice of the use, it was far more than a mere *jus in personam*." [1]

There were, however, on the other hand, some good reasons for interference by the legislature, for in no other way was there much likelihood of removing several abuses attendant upon the development of the use; for example, even in the fourteenth century the use was employed to defraud creditors in whose behalf Parliament several times intervened. At the same time since unincorporated bodies could take as *cestuis que usent* it was possible to place land into mortmain in spite of the statute. Then, also, during the disorders of the fifteenth century lands were frequently given to great lords to the use of the donor, who thereby

[1] 4 Holdsworth, 433, 434.

secured the support of a great magnate in defending the legal title. It was also discovered that a tenant of lands could prevent the rightful owner from bringing his action, or greatly delay him, by conveying the land to feoffees to his own use, and a statute of 1483 gave a remedy by allowing the writ to be brought against anyone who was receiving the profits of the land—it will be noticed that this statute adopts the momentous principle of treating the *cestui que use* as though he were the legal owner. There was also at least one grave disadvantage which weighed upon *cestuis que usent*, for they could not convey a legal estate, and so another statute of the same year, 1483, conferred this power upon them. This statute, too, treated the *cestui que use* as a legal owner, and so foreshadowed the policy of Henry VIII in the great Statute of Uses.

Finally, a most important aspect of uses was the impossibility of fitting them into the feudal system. Their effect was usually to defraud the lord of the incidents of wardship, marriage and relief. This was not so serious a matter for the great nobility, for to some extent they could obtain the same advantage by the same means against the Crown. But it will be observed that whoever gains by the arrangement the Crown is sure to lose, and this aspect of the situation was painfully apparent to Henry VIII. The great Reformation Parliament had accomplished a tremendous amount of epoch-making legislation, especially in carrying out the Reformation settlement. This settlement was viewed without enthusiasm by a large part of the populace and Parliament itself was none too well disposed towards the Crown. Henry VIII felt that it would be unwise and perhaps unavailing to seek from Parliament a further grant of taxes and was therefore left to depend upon the hereditary revenues of the Crown. Of these only the feudal incidents seemed capable of any great expansion, and here the situation was complicated by the existence of uses. Having just carried out the Reformation settlement and assumed the headship of the Church, it is not surprising that Henry VIII was ready to apply heroic remedies. He contemplated nothing short of a drastic revision of the common law along lines which would suit the interests of the Crown. In 1529 a draft proposal was drawn up representing a treaty between the Crown and the peer-

age with this end in view.[1] The King and the lords proposed this arrangement: there was to be only one estate in land and that a fee simple, except that peers of the realm were to have the privilege of entailing their lands; uses were only to be valid if registered, and elaborate provisions were drafted to insure the utmost publicity; the lands of peers were to be subject to feudal dues in respect to equitable as well as legal estates; they could also be entailed, devised and settled, but elaborate provision ensured that none of these devices should defeat the feudal rights of the Crown: and finally, in return for the heavy burden of feudal duties it was proposed that the land of peers of the realm should be inalienable save by royal license. This bargain if it could have been carried out was eminently satisfactory to the King and to the peers, for the latter in return for their liability to inescapable feudal duties acquired the privilege of having their fortunes assured to them by inalienable rights.

It has always been a feature of English society that there was no deep line drawn between the peerage and other classes. There were plenty of great landowners as wealthy and as influential as the peers, who were in fact untitled, and it was this large and powerful class which, combined with the common lawyers, defeated the 1529 compromise. The large landowners who did not happen to be peers found themselves deprived by these proposals of the right to entail or to make secret settlements or alienations: all the details of their family arrangements were to be proclaimed in the parish church and in the market place. Feudal incidents were to be vigorously exacted from them as from the peers, only the commoners got nothing in return. As for the common lawyers they saw in this arrangement the ruin of their profession: it left them no more interesting topic of study than a fee simple, save in the very few cases of peers, and at this moment there were but fifty peers of the realm. The use still remained and was to be the means of effecting settlements, but all this business was to go to Chancery, consequently leaving the common lawyers with practically no business. A combination of great landowners and common lawyers, therefore, defeated these proposals in the House of Commons and convinced the King that an alliance with the peer-

1 Holdsworth, who discovered these documents and elucidated their significance, has printed them in the appendix to his fourth volume.

age had no chances of success. He therefore had to seek support elsewhere and that support would have to be in the House of Commons. It seemed clear that the common lawyers might very well turn out to be the key to the situation; in any case whatever settlement was eventually made would depend for its working upon the machinery of the law. And so, first of all, the lawyers had to be reduced to a tractable frame of mind, and to this end Henry VIII received with marked sympathy various petitions complaining of the delays of the common law, its expense, and its failure to do justice. This gesture gave the common lawyers to understand that the Crown might demand from them some very radical reforms, and once again the profession felt that its existence was at stake. At the same time numerous commissioners were conducting searching examinations into the affairs of the landed gentry, suspecting that the King's rights were being defeated by the common lawyers' allies. Various proposals were made in the course of the next few years, and gradually the attack now centered against the use.

"The list of grievances suffered by the realm from uses is long and detailed. It is written in two hands and there is a certain amount of repetition. In some cases it gives particular instances of inconveniences suffered, and at the end there is a summary statement of the various fraudulent purposes which uses had been made to serve. The writers insist much on the disadvantages of uses from the point of view of the *cestui que use*, of the public at large, of the King and lords, and of the law. The *cestui que use* is at the mercy of a fraudulent bailiff or feoffee; nor can he take action against a trespasser. He loses his curtesy, and his wife her dower. The King loses his forfeitures, and King and lords lose their incidents of tenure. The public at large is defrauded because no man can tell against whom to bring his action, nor is anyone secure in his purchase. The law is wholly uncertain—'the openyons of the Justices do chaunge dely apon the suertyez for landes in use.' The use is 'but the shadowe of the thyng and not the thyng indeyd.' It causes the law to be double, and to sever the real from the apparent ownership, 'which is a grett disseytt.' Where per case some one man 'takyth esyngler welth their be a hundrioth against one that takyth hurt and losse theirby, is yt a good law?' the writer asks. He thinks that it would be a good thing if uses were 'clene put out the lawe.' The document is an able statement of the case against uses; and it may well have been the raw material upon which those who drew the preamble to the statute worked."[1]

Of these various schemes, one finally became the famous Stat-

[1] 4 Holdsworth, 455, 456.

ute of Uses (1536).[1] Under this arrangement the King secured his feudal dues, but the price he paid was to the common lawyers instead of to the nobility and Chancery. Indeed, it was the common lawyers who gained most by the Statute of Uses. After a great deal of difficulty and some concessions from the Crown the statute finally passed.

"Maitland has truly said that the Statute of Uses 'was forced upon an extremely unwilling Parliament by an extremely strong-willed King.' But I think that the evidence shows that this strong-willed King was obliged first to frighten and then to conciliate the common lawyers in order to get the statute through the House of Commons; and that probably their opposition caused the failure of his well-considered scheme for the registration of conveyances. If this be so the action of the common lawyers has had a large effect upon the form which the Statute of Uses and the Statute of Enrollments finally assumed, and consequently upon the whole of the future history of the law of real property."

The statute carried to its logical conclusion the policy begun by Richard III whose statutes had allowed the *cestui que use* to be treated for certain purposes as though he were the legal owner. Under the Statute of Uses the *cestui que use* becomes the legal owner for all purposes, and is invested by the statute with the benefits of the mysterious seisin which is the essence of a common law estate. This transformation operated by the statute converting a use into a legal estate is technically known as "executing the use." As for the King, he will receive all his feudal dues unimpaired, for the uses will be executed and feudal incidents will attach to the legal estates created by the statute. As for the common lawyers, they won a great victory over Chancery. Under the 1529 compromise Chancery would have secured almost all real property business, as that proposal retained the use and abolished the entail; under the statute the common lawyers not only retained the entail but obtained jurisdiction over all matters arising out of uses, since under the statute they were executed and became common law estates. As for the landowners, there was less cause for satisfaction. They retained the entail and the use but since the statute they could no longer be employed as a machinery for the devise of land, while at the same time the Statute of Enrollments (which was a part of the scheme) enacted that a bargain

[1] The text is in Digby, *History of the Law of Real Property*, 347–354. (His history must be taken subject to correction by Holdsworth.)

and sale of freeholds and fees must be by deed enrolled. The bargain and sale was a very popular form of conveyance depending upon the use for its operation, and so the statute in substance compelled publicity of conveyance—until means were found to evade it by means of the lease and the release. Finally, if we are to consider the nation at large, it was they who paid the heaviest price, for the complicated diplomacy which made way for the passage of the statute depended upon the understanding that there should be no more talk of reforming the common law.

After a long and argumentative preamble—"the sixteenth-century equivalent of a leading article in a government newspaper upon a government measure"[1]—the statute proceeds to enact that *cestuis que usent* shall be seised of legal estates corresponding to the estates they had in use. Then we come to the provision that a legal jointure shall be a bar to dower. It must be remembered that the statute did not propose to abolish uses, for in more than one place it contemplated the creation of uses in the future. Its object was to avoid the inconveniences which were caused by having two forms of ownership, one legal and the other equitable, by declaring that the beneficiary shall have a complete legal estate and that the feoffee to use shall have none at all. This altered the character of the use, but did not destroy it. The statute did not apply to active uses, nor to uses out of chattels real or personal. The great merit of the arrangement was that the greater freedom in conveyancing by means of the use was preserved and made available to common lawyers.

To the landed gentry the Statute of Uses seemed a calamity, and in the rebellion of 1536 which described itself as the "Pilgrimage of Grace" we find among numerous other grievances—the dissolution of the monasteries, the religious changes, the divorce question—a demand for the repeal of the Statute of Uses, particularly because it abolished the powers of devise hitherto enjoyed by landowners. Henry VIII was well aware of the seriousness of opposition when it came from so important a class as the country gentry. By this time the enforcement of any government policy (and Henry VIII's revolutionary policies needed a good deal of firm enforcement) depended very largely upon the co-operation of the local gentry, who as justices of the peace were

[1] 4 Holdsworth, 460.

responsible for local government. He felt that the time had come for a concession to the landed gentry, and this took the form of the Statute of Wills (1540), which conferred complete powers of devise over socage lands, and over two thirds of land held by knight service accompanied by the usual provisions (based on the principle that a devisee was to be deemed as in by inheritance) to safeguard feudal dues. Two years later the statute was amended in numerous points of detail. In 1540, following the usual Tudor policy of erecting administrative courts for special business, Henry VIII established the Court of Wards whose duties were to be the supervision of the King's feudal revenue especially as it was affected by the Statutes of Uses and Wills. For about a century the statute achieved its great object of combining the legal estate with the enjoyment of the land. When, finally, means were devised to circumvent the statute and to restore the old situation under which the legal title might be in one person and the benefits of ownership in another, this took the form of the trust, and it became established in the end that a conveyance to A to the use of B to the use of C had the effect of placing the legal estate in B under the operation of the Statute of Uses, while C had an interest which would be protected in equity as a confidence or trust. For a long time the common law courts refused to admit this highly artificial view. For some time even before the Statute of Uses the courts had been establishing the principle that the use must be clearly expressed and must not conflict with other uses. We suggest that this is a reasonable doctrine, although some writers have found it "wonderful" and have referred it to the mysteries of the mediæval metaphysics. As we have already observed, there were good feudal reasons for refusing to recognize a use out of an estate tail, on the grounds that the use was repugnant to the relationship of tenure. Somewhat similar reasoning was applied to cases where a use was raised out of a preceding use. When faced with a conveyance to A to the use of B to the use of C the sixteenth-century courts argued that the use to C is repugnant to the use to B and therefore void. Under the circumstances this was not an unreasonable position, for it must be constantly remembered that the modern ideas on the nature of equitable ownership did not prevail in the sixteenth century. At that time it could not be seriously maintained that a *cestui que use* before

the statute had a property right; that being so, his position was not sufficient to support a subsequent use, for, as we have seen, it needed a fee simple to support a use in the sixteenth century. So, too, the same principle was applied to cases where the first use was not expressed but arose by operation of law. This is the point of *Tyrrel's Case* (1558).[1] In consideration of four hundred pounds paid by George Tyrrel, Jane, his mother, by deed enrolled, bargained and sold to George all her lands to hold to him and his heirs to the use of Jane for life and various other uses. It was held by the Court of Wards consulting with the Justices of the Court of Common Pleas that the bargain and sale implied a use in favor of the bargainee, and that, therefore, the bargainor could not impose any further uses for they were repugnant: after the statute as before we find the same principle, namely, that one conveyance can only contain one set of uses, and this in the interests of clarity and simplicity. Once again we must insist that in the sixteenth century a use, until it has been executed by the statute, falls very far short of ownership. So, again, in *Girland* v. *Sharp* (1595)[2] lands were enfeoffed to the use of the feoffor for life and after to the use of the feoffees and their heirs "for the fulfilment of the feoffor's last will;" the will devised in favor of Sharp, and it was held that Sharp could not take, for the feoffment first of all gives a use to the feoffees and their heirs, and after that another use to the devisee. Once again we have a use upon a use, and the second one must be held repugnant and void.

These decisions came from common law courts, and in *Tyrrel's Case* from the Court of Wards, which we may presume was particularly interested in maintaining the policy of the statute and the financial interests of the Crown. At the close of the sixteenth and early in the seventeenth century Chancery ventured to intervene and attempted to regain some of the jurisdiction which it had lost to the common law courts. It was found that the statute left some cases unprovided for, notably the settlement of long terms of years;[3] active uses were likewise not executed, and it was easy to make exceptions in favor of charitable trusts and cases where

[1] Dyer, 155; Benloe, 61; 1 And. 37; Digby, *History of the Law of Real Property* (5th edition).

[2] Cro. Eliz. 375.

[3] See above, p. 374 n. 1; they had long been used at common law to evade feudal dues and were therefore viewed with disfavor.

fraud was clearly present. In this way the Court of Chancery was enabled to develop a new law of confidence or trust whose main outlines followed that of the use. Such trusts if for purposes of settlement were frequently created out of a term of years, which under the old law would not support a use by reason of the tenure, but after the statute the equitable interest attached to the term was not executed as a use for the statute only referred to feoffments in fee; the way was therefore open for the Chancery to enforce it as a trust. Finally, the old doctrine of *Tyrrel's Case* and others that a use could not be engendered of a use was abandoned and a newer doctrine expressed in 1600 in *Finch's Case*,[1] where it was said *obiter* that "if a man make a conveyance (by bargain and sale) and express a use, the party himself or his heirs shall not be received to aver a secret trust other than the express limitation of the use, unless such trust or confidence do appear in writing or otherwise declared by some apparent matter." In other words, the implied use which arises in a bargain and sale can be made to support a second use if the latter is clearly expressed, whereupon it will be enforceable as a trust. *Tyrrel's Case* is therefore abandoned in principle. But it was only after tenure in chivalry was abolished in 1660 that Chancery could confidently proceed with this policy and uphold the second use as a trust—for the old theoretical objections had now lost their force, while the political ones were removed with feudal services. The trust in real property was therefore put beside the trust of personalty and both proceeded to develop together.

Just about a century after the statute, therefore, legal and equitable interests are again separated, for by this time the real and veritable difficulty had been faced and overcome by abolishing military tenure with its costly and troublesome incidents.

[1] 4 Inst. 86.

CHAPTER IX

CONVEYANCES

The Anglo-Saxon form of conveyance was at first extremely elaborate and was imitated from continental models. Like them it may very well have acted as a conveyance, that is to say, transferring the complete title without the requirement of any further ceremonies. As for the transfer of folkland it is less possible to speak with confidence since in the ordinary course of events it seems to have been effected without charter or written document. Such traces as we have, seem to indicate a ceremonial transfer accompanied by great publicity, sometimes in the county court and more frequently in the hundred court. At the same time we find the appearance of *festermen* whose function is somewhat obscure. If we may venture a guess it would be that they partly represent the *borh* or surety whose presence so frequently rendered an Anglo-Saxon contract a three-cornered affair.

Towards the end of the Anglo-Saxon period the elaborate charter is replaced by a simpler form which modern historians call a writ charter. This is derived from the administrative writ and was originally merely a letter of instructions sent by the King to some official. This brief and convenient form was soon used for all sorts of purposes. From this single ancestor are derived the charter and letters patent which are the form of a good many grants of property and privileges, including the Great Charter; so, also, the letters close which were the great administrative instrument in the middle ages; likewise the original writs on which the forms of action were based; and so, too, the conventional forms of conveyance.

When we come to the Anglo-Norman age we find that already the law had made a great decision. The deed no longer operates as a conveyance, but is simply evidence. With the decline of the Anglo Saxon charter we find the end of the brief period during which a document was capable of transferring rights, and a return to the more ancient native practice which insisted upon an actual delivery of chattels or livery of seisin of land. In consequence of

this the importance of the deed is much reduced, and in the Anglo Norman age there can be no doubt that a great deal of land was transferred without deed. The essence of the transaction was a complete and public change of the occupancy of the land in question; even the symbolic transfers of the previous age are no longer effective (at least in the royal courts); instead we find the purchaser entering upon the land and expelling from it the previous owner and his family, his servants, beasts and chattels, all which is done in the most public way. The deed is at first a sort of memorandum in the form of a writ-charter recounting the transaction in the past tense. The document usually begins in the name of the vendor in such words as these, in the thirteenth and later centuries:

"Know all men present and to come, that I, A. B. have given and granted and by my present charter confirmed for myself, my heirs and assigns, to C. D. his heirs and assigns forever, all that land of mine. . . ."

—and here the boundaries are set out with some particularity. Then comes the following clause:

"To have and to hold to C. D. his heirs and assigns, of me and my heirs rendering therefor annually. . . ."

At this point (called the *habendum*) the rights and services are set out, and if the gift is in fee-tail the limitations will be specified. In deeds executed after the Statute *Quia Emptores* the *tenendum* will have to be in the form "to hold to D. C. of the chief lord of the fee by the services rightfully and customarily due." We then come to the very important clause of warranty in this form:

"And I, my heirs and assigns will warrant the said land to C. D. and his heirs and assigns against all men forever. . . ."

This warranty clause was a great protection to the purchaser, for if his title was subsequently attacked he could call upon his warrantor to come into court and defend it, and if he lost the warrantor was bound to recompense him with land of equal value in the same county, while at the same time the warranty acted as a bar to any claim by the donor and those whom he bound; as we have already said, at the beginning of the thir-

teenth century the clause of warranty served to bar the claims of heirs who might otherwise try to recall their ancestor's gift. The clause of warranty was followed by a clause announcing that the deed was sealed, in forms that varied considerably; it is not infrequent to find something like this:

"And in order that this gift, grant and confirmation may remain forever good and valid, I have appended to this present writing the seal of E. F. because I have not one of my own. In the presence of these witnesses. . . ."

In the fourteenth century the charter frequently omits to mention the seal, although no deed was valid without a seal. Before the reign of Edward I it is unusual to find the deed dated, but from the fourteenth century onwards the sealing and witness clauses are replaced by a dating clause announcing the time and place. In the fifteenth century livery of seisin degenerates into a ceremony, and frequently the vendor and purchaser made attorneys to give and receive livery of seisin; a memorandum of the due performance of this was endorsed upon the deed. We do not commonly find signatures on deeds before the sixteenth century. Sometimes as a greater security the deed was written in duplicate (particularly if it were a lease containing elaborate covenants) upon the same piece of parchment, and the two deeds were then separated by an indented cut passing through the word CIROGRAPHUM. Such a deed was called an indenture although it is only late that we find the appearance of the modern form beginning, "This indenture made at such a date witnesses that . . ." At first the form of an indenture was merely a precaution, but soon this precaution was felt to be so valuable that the indenture acquired a special position in law by creating an estoppel, and as being equally the deed of all the parties to it.

This general framework could be used for a variety of transactions besides the gift or grant. Thus a release could be used where the donee was already in possession and the lord released his rights, under such circumstances livery of seisin being unnecessary. It was used during the middle ages to take the place of a deed, two documents being necessary, first the lease and then the release—and sometimes its purpose was fraudulent. The release was also commonly used when a disseisee conveyed his rights to the disseisor. The converse of a release is the surrender where-

by a tenant for life or years surrenders his interest to the reversioner. Gradually a distinction is drawn between the feoffment of land and the grant of reversions, advowsons, rents and other incorporeal things which only "lie in grant and not in livery."

A second type of deed used the machinery of the law courts. We have already mentioned that in Anglo-Saxon times transfers of land were frequently made in court, and in the early Norman period we find numerous attempts to obtain some sort of official record of a transaction. In consideration of a fee a private deed might be enrolled upon the pipe rolls, while soon after it became a frequent practice to enroll private deeds on the back of the close roll. This practice had a curious history for in the course of time the official documents upon the close rolls gradually became fewer while the private deeds enrolled upon the back became more numerous, with the result that the modern close rolls (they extend in unbroken series from 1204 to 1903) consist entirely of deeds enrolled and contain no official business whatever.

Another attempt in the same direction took the form of litigation which was brought into court solely for the purpose of being compromised upon terms which the court approved and recorded. This became so frequent that a special form was ordained on the fifteenth of July, 1195, and this form was observed until 1833. This proceeding was called a fine or final concord, and the essential parts of it are the original writ commencing the action, the license to compromise, the note or memorandum of the terms, and the final document in which those terms were solemnly set forth. This document was in fact a tri-partite indenture, three copies being written on the same sheet of parchment, one for each party and one at the bottom for preservation in the royal archives. This was called the foot of the fine. There is an unbroken series of these feet of fines in the Record Office constituting an extraordinary mine of information for local history and for the history of real property law. As time goes on the procedure by fine becomes complicated and a number of different sorts of fines are invented each with its peculiar properties. The effect of a fine was much more powerful than that of a deed. To begin with, its authenticity is usually beyond dispute. It is very rare indeed that parties succeeded in corrupting government clerks to tamper with a foot of the fine and even then discovery was inevitable. Its legal effects

were several times changed by statute. In the middle ages it was commonly used to convey reversions because there was a rapid process for compelling particular tenants to attourn. An additional advantage was that litigation to enforce the fine later on could be conducted expeditiously by a writ of *scire facias* instead of a costly and expensive real action. The fine is therefore the highest and the most solemn form of conveyance known in the middle ages. In its early days, after a short period of limitation a fine operated as a bar to all the world. The period was at first twelve months, and the only exceptions were in favor of minors, lunatics, prisoners and people beyond the seas. In particular forms the fine could be used to avoid the necessity of giving livery of seisin and so it begins to become more like a true conveyance.

The statutory changes which were made were chiefly important as affecting the efficacy of the fine as a disentailing device, and of this we shall speak later. Otherwise its principal uses were, as we have said, to convey reversions and remainders and as a means for a married woman to convey her land so absolutely as to bar actions of *cui in vita* and *sur cui in vita;* for this purpose she was brought into court and examined by the judges in order to be sure that she freely consented to the conveyance.

Recoveries were also used in a variety of forms during the middle ages, but in almost every case they seem to be tainted with fraud. It can hardly be said that a recovery becomes a common assurance and a strictly legitimate proceeding until the sixteenth century. In the middle ages it was used to convey land free of a term, to bar dower, by a husband to alienate his wife's land and to defeat her heirs, and to alienate into mortmain. A stream of legislation checks first one and then another of these practices. In the sixteenth and seventeenth centuries a particularly elaborate form of conveyance was devised for the purpose of disentailing which combined the two; a fine was first of all levied in favor of a person who thereby obtained a sufficient estate to become "*tenant to the præcipe,*" and he in turn allowed a collusive real action to be brought against him and vouched to warranty a man of straw, usually the crier of the court. Judgment then went against him and the demandant recovered against the tenant, and the tenant acquired a nominal judgment against the common vouchee. In

some cases double and even treble vouchers became necessary, and a mass of complicated learning prevailed which is available to the curious in the monumental treatise of Cruise, *On Fines and Recoveries.*

In the sixteenth century we come to a new class of conveyance which depends upon the use for its effect. The simplest form is where the grantor makes a covenant to stand seised to the use of the grantee who thereupon takes the use, and after the Statute of Uses, a legal estate. More complicated was the bargain and sale. Chancery had long had the doctrine that where the bargainor had received the purchase money but still remained seised of the land he held only to the use of the bargainee. The Statute of Enrollments, in view of the fact that the Statute of Uses would execute the use arising on a bargain and sale and convert it into a legal estate, provided that such bargains and sales must be enrolled—which was all that remained of Henry VIII's ambition to introduce a system of universal registration of deeds. This statute was very obnoxious to the landed interests and soon they found a way of evading it which took the form of a bargain and sale of a term of years followed by a release. Neither of these deeds was within the words of the statute and so once more a means of secret conveyance was discovered. This is the classical form of "lease and release." The great effect of the Statute of Uses upon conveyancing was to introduce more flexibility, since uses need not be constructed with all the art that was necessary in limiting common law estates; while, secondly, the provision of the statute executing the use removed almost the last vestige of the mediaeval seisin. Deeds depending for their operation upon the Statute of Uses were true conveyances for they were completely operative in themselves and needed no livery of seisin.

Since the Statute of Wills these documents must be considered as conveyances, and at first they were treated on strictly conveyancing lines. For example, a will would only pass such lands as the testator was seised of both at the time of making the will and at the time of his death, which perpetuates the situation existing before the Statute of Uses when land was devised by conveying it to feoffees to the uses of the feoffor's will. Henry VIII's statutes made no requirements as to the form of a will save that it be in writing, and it was not until the Statute of Frauds that this and a

good many other matters were required to be expressed in writing, signed, and in the case of wills witnessed. The Statute of Frauds also required written documents for the creation of trusts of land, and for the assignment of all sorts of trusts, and therefore contributed a great deal towards the treatment of these equitable interests as though they were property.

A few words may now be said upon disentailing devices. A simple deed by a tenant in tail will convey a fee simple to the alienee but will not bar actions by the heir in tail, remaindermen or reversioners; *De Donis* itself provides that even a fine by the donee in tail will not bar his issue or the reversioner. Experiments were therefore made with the deed with warranty and some very curious results followed, for the Statute *De Donis* made no provision for this case—although it will be remembered that the deed with warranty played its part in establishing freedom of alienation of fees simple. The simplest case was where the warranty descended in the same line as the title, such as commonly happened when a father alienated with warranty and the warranty descended together with the title and the entail to his heir. This warranty barred the heir from his recovery, and so in this way an entail could be effectively barred as against the heirs in tail; of course it did not affect remainders or reversions. This did not last very long, for the Statute of Gloucester, c. 3 (as interpreted by case law), enacted that such a warranty should only bar if the heir had also inherited other lands unentailed, out of which he could fulfil the warranty. If he had such "assets by descent" he was barred to the extent of those assets, otherwise not. Consequently soon after 1278 a deed with warranty might not be a bar if there were assets by descent. At this point a subtle distinction was introduced. The cases we have considered were described as lineal warranties because the burden of the warranty and the title both descended by the same line. It was now discovered that this was not always the case for a warranty might be collateral, and it was held that collateral warranties were always a bar, while the one exception of the Statute of Gloucester could not apply to them. It was not always easy to use collateral warranties, for it needed the co-operation of other members of the family and also depended upon relatives dying in the proper order, and these conditions were not always available. When they were, a collateral warranty

was a very effective bar to the issue in tail. For example, A is tenant in tail and C is his son and heir. In order to bar C's descent A alienates to X; X then secures a deed of release with warranty from A's younger brother B. B dies without issue and then A dies; C is the heir of B as well as of A, and B's warranty descends upon C by a collateral line, and will therefore bar him absolutely. It is immaterial that B never held the land and had no interest in it, for if he chooses to undertake the warranty he is at liberty to do so. Several times in Parliament protests were made against the collateral warranty rule during the reign of Edward III, but it was not until the reign of Queen Anne that the bar by collateral warranty was abolished; curiously enough the statute did not abolish the bar by lineal warranty without assets descended.[1] The effect of both of these warranties upon remainders and reversions was very doubtful and in order to bar these estates other devices had to be invented.

Among these was the fine. By *De Donis* a fine was no bar to an entail, and in 1360[2] by statute it ceased to be a bar to any claimant. This, however, introduced so much uncertainty and permitted the assertion of so many remote and dormant titles that Richard III by a statute which was re-enacted by Henry VII[3] (the Tudors usually got the credit for Richard III's reforms) enacted that a fine should be a bar after certain proclamations and the lapse of five years, while remaindermen and reversioners were to be barred by a fine with proclamations unless they claimed within five years of the time when their estates accrued. A case and later a statute[4] held further that a fine with proclamations is a complete bar to the issue in tail since they are deemed to be privy to it. A fine consequently after the statute will bar the issue, but not remainders or reversions save in the unlikely case where they let their rights go by default. The problem of barring remainders and reversions was finally settled by means of the recovery. In the fifteenth century a number of forms were tried but it seems always assumed that the recovery could be "falsified" if fraud or collusion were proved. Then the recovery with voucher was invented, and in 1472 we come to the famous *Taltarum's*

1 4 & 5 Anne, c. 16.
2 34 Edw. III, c. 16.
3 1 Ric. III, c. 7; 4 Hen. VII, c. 24.
4 Dyer, 2 b; 28 Hen. VIII, c. 36.

Case[1] which is generally regarded as establishing that a recovery with voucher would bar a reversion; it is not at all clear, however, what the case decides—if anything. It is in the sixteenth and seventeenth centuries apparently that it is finally decided settled that a recovery with one or more vouchers suffered by a tenant to whom outstanding life estates have been conveyed by fine will completely bar an entail. In 1833 the Fines and Recoveries Act[2] retained this situation but with much simpler machinery by empowering "the protector of the settlement" (who represents the old tenant to the *præcipe*) to execute a disentailing deed.

The development of the mortgage is an interesting example of the interplay between legal doctrine and conveyancing custom. The gage which is the root idea of the transaction is really a relic of the days when credit was not yet in existence.[3] In its oldest form the gage (in Latin *vadium*, and in modern English pledge[4]) was payment, subject only to the option of the purchaser to substitute at a later time payment in a different kind. Under this arrangement the handing over of the gage settled the debt; the creditor could not demand the substitution of a different kind of payment, and the debtor had no way of recovering any excess value in the gage over the price which he could substitute later. This arrangement was capable of two developments: first, the gage may become a slight object whose transfer is treated as a binding form, or the transaction may take its modern aspect of security only for the payment of the principal debt.

Here we are particularly concerned with the gage of land, which appears in England as early as *Domesday Book*. A century later Glanvill describes it, first of all stating that if the King's Court is to take notice of a gage it is essential that the gagee be in possession; otherwise, he says, the same land might be engaged to successive creditors, creating a situation much too complicated for the royal justice. As far as the King's Court is

[1] The case is translated in Digby, *History of the Law of Real Property* (5th ed.) 255–258. The case was in fact *Hunt* v. *Smith*, but it involved a recovery by one Talcarn whose name became curiously corrupted in the *Year Book*.

[2] 3 & 4 Will. IV, *c.* 74.

[3] See Wigmore, *The Pledge-Idea*, 10 Harvard Law Review, 321–389; and Hazeltine, *The Gage of Land*, 3 Essays in Anglo-American Legal History, 636.

[4] Remember that the mediæval "pledge" (*plegius*) is always a person, not a thing.

concerned, the gagee must therefore be in possession, and he may hold in several different ways. For example, the land may be leased for a term of years at the end of which the debt must be paid, or title will pass automatically to the gagee. Or, on the other hand, the lease may be for a term of years without containing a clause releasing the title to the creditor on default; in such a case it will be necessary to obtain the judgment of the court before the creditor's title becomes complete. As we have seen, the gagee is always in possession and receiving the profits of the land. If those profits are applied to the reduction of the debt, Glanvill tells us the transaction is called a *vifgage*: if, however, the profits do not reduce the debt but are taken by the gagee, then the proceeding is usurious, dishonest and sinful, and is therefore called a mortgage. The mortgage is nevertheless legal as far the King's Court is concerned.

This type of gage as described by Glanvill finally fell into disuse. Its obvious disadvantages were that the debtor was always out of possession; that although the gagee was in possession yet he was not protected by the petty assizes, and so if he were ejected he had no means of recovering his security; and worse still, the debtor himself might eject the gagee and thereby reduce him to the position of an unsecured creditor.

When we come to Bracton we see attempts to fit the gage into the scheme of estates. Gages may therefore be effected by selling a term of years for a sum down; the advantage of this is that there is no debt at all, and therefore no usury, and no gage, while the termor is now protected against the lessor. An alternative arrangement was a lease for a term of years with the condition that if the debt is not paid at the end the lessee shall hold over in fee. This shifting fee for a time raised no technical difficulties. Still another arrangement was a conveyance to the creditor in fee with a covenant for a re-conveyance if the debt is paid on the date fixed. Upon this form *Britton* makes the significant remark that there is no equity of redemption although some people think there ought to be.

And so we come to the rise of the modern form of mortgage. Speaking of such an arrangement, a common law judge in 1314 used these remarkable words: "When a man pledges tenements his intention is not to grant an estate of inheritance, but to secure

the payment of the money which he borrowed promptly, and to get back the tenements when he had paid the money."[1] If the common law had kept to this doctrine it would have anticipated by several centuries the achievements of Chancery; very soon, however, the common law courts lost the equitable spirit which distinguished them in the reign of Edward II, and construed the terms of a mortgage strictly according to the letter. While the Jews were in England matters were in a much more satisfactory state. They had their own law and customs and the Crown maintained a special court (a division of the Exchequer) for their enforcement. Among these customs was the possibility of a gage in which the gagee was not bound to take possession; gages to Jews were, however, subject to a system of registration established by Richard I.

"Very early in the thirteenth century we may see an abbot searching the register, or rather the chest, of Jewish mortgages at York in quite modern fashion. A little later an abbot of the same house, when buying land, has to buy up many encumbrances that had been given to Jews, but has difficulty in doing so because some of them have been transferred. The debts due to Israelites were by the King's licence freely bought and sold when as yet there was no other traffic in obligations. We may guess that, if the Jews had not been expelled from England, the clumsy mortgage by way of conditional conveyance would have given way before a simpler method of securing debts, and would not still be encumbering our modern law."

From the fourteenth century onwards we therefore find the common law courts construing mortgages strictly; in the sixteenth century Chancery began to give relief against penalties and it may be that on this basis Chancery also intervened at the close of the sixteenth century and developed its doctrine of the equity of redemption. It is, however, from the close of the seventeenth century, when Sir Orlando Bridgman was Lord Keeper, and after him Lord Nottingham, that equity began to elaborate a considerable body of law, some of which modified the common law mortgage, while the rest applied to types of mortgages which were peculiar to equity, such as second and subsequent mortgages, and the remarkable equitable mortgage effected by merely depositing title deeds—which was clearly contrary to the words and the policy of the Statute of Frauds.

[1] 3 Eyre of Kent, 85 (Selden Society).

PART II

CONTRACT

It is remarkable that in spite of the numerous foreign influences which were at work in the field of contract, the common law was so little influenced by them. The Church very early took a strong view of the sanctity of contractual relationships, insisting that in conscience the obligation of a contract was completely independent of writings, forms and ceremonies, and endeavoring as far as she could to translate this moral theory into terms of law. Then, too, there were the mercantile courts which were endeavoring to enforce the practice of the best merchants and to express that practice in terms acceptable to either or both of the two conflicting schools of legal experts whose approbation was necessary—the civilians and the canonists. In England all these influences were at work. Glanvill knew just enough of the Roman classification of contracts to be able to describe—and then misapply—it, while Bracton endeavored to express common law in Romanesque language. In the later middle ages ecclesiastical Chancellors in England were acting on canonical ideas—and yet in spite of all this the English law of contract is neither Roman nor canonical. If we are to seek the reasons for this we shall have to examine a good deal of procedural detail. The various systems of procedure which we call forms of action had come into existence and had taken definite shape long before English law regarded the field of contract as a whole, or even as being essentially contractual in many cases. By the time these foreign influences became strong the common law had already developed an inflexible system of machinery which did not easily permit the introduction of new ideas. In consequence the common law courts were left to develop a law of contract as best they could out of the stubborn materials of the forms of action, and so, after many years of uncertainty and long conflicts with technical and procedural difficulties which by that time were inherent in the common law system, we finally arrived at a systematic law of contract about three centuries later than the rest of the world. This Part will therefore be devoted to a brief summary of the lines along which the common law of contract developed.

CHAPTER I

ORIGINS

In the Anglo-Saxon period a law of contract would have been a luxury. The enforcement of public order and the elementary protection of life and property were as much as the Anglo-Saxon states could undertake with any hope of success. We therefore find that the Anglo-Saxon law regarded contract as somewhat exceptional and only undertook to enforce it under particular circumstances.

In order to conclude a contract Anglo-Saxon law required numerous external acts, and several of these survived for many centuries. First of all there was *wed,* which after the Norman Conquest was called *gage* and consisted of a valuable object which was delivered by the promisor either to the promisee himself or to a third party as security for carrying out the contract. Then, too, there was *borh,* which after the Norman Conquest was called "pledge" and consisted of personal sureties. It must always be remembered that during the middle ages the word "pledge" means a person and not a thing. In the course of time the valuable gage is frequently replaced by a trifling object of slight value or even by a small sum of money; the gage consequently becomes merely a symbol or ceremony instead of a valuable security, and the contract is then said to be formal. The Statute of Frauds and later legislation sanction the continuance of this type of contract concluded by earnest money.

The occasions upon which it became necessary to contract during the Anglo-Saxon age were mainly of two types. In the first place the solemn ceremonies by which a betrothal was effected were essentially contractual, for the betrothal was in effect a contract for a sale. The Anglo-Saxon marriage on its civil side (which was independent of the Church's sacramental views) still consisted of the sale by the woman's kinfolk of the jurisdiction or guardianship over her (which they called *mund*) to the prospective husband. Even after this ceased to be a strictly commercial transaction, betrothal and marriage ceremonies retained a good

many survivals of the older order—Maitland has described the marriage forms of the Church of England as "a remarkable cabinet of legal antiquities," and the Episcopal Church of America has also retained most of them. The betrothal was effected by the delivery of *wed* and thus became a wedding, that is to say, a ceremonial conclusion of a contract for a future marriage.

The other great situation in which contract played a part was the conclusion of a treaty subsequent to a homicide. The Anglo-Saxon texts tell us with great particularity the procedure to be followed in order to exact the payment of *wer* by the slayer to the kinsmen of the victim. The sum involved was considerable, and then, as throughout the middle ages, it was difficult to liquidate a large debt in cash. It therefore became necessary to allow the slayer credit and this was done by assembling every contractual engine known to the law. Spokesmen were appointed, and negotiated until it seemed prudent to allow the parties to come face to face. Then the treaty was made, the slayer promising to pay and the kinsmen of the slain calling off the feud; until finally the transaction was completed by giving *wed* and finding *borh*.

Gradually other matters came to be treated in the same manner and with the same machinery, that is to say, the valuable security of *wed,* and the surety of *borh*. This *borh* becomes in effect a third party to the proceedings and in many cases the Anglo-Saxon contract is clearly a three-party arrangement. Thus we find a party contracting by *wed* and *borh* to appear in court, which in those days was regarded in much the same light as a modern submission to arbitration. As Professor Holdsworth observes:

"The furnishing of the sureties was no mere form; it was a substantial sanction. These sureties were bound primarily to the creditor; and it was to the sureties that he looked for the carrying out of the undertaking. The debtor, according to the Lombard law, gave the *wed* to the creditor, who handed it to the surety as the sign and proof of his primary ability. There is thus some ground for the view that the institution of suretyship is the base upon which liability for the fulfilment of procedural and eventually other undertakings was founded. Probably these sureties were regarded somewhat in the light of hostages; and English law still retains a trace of this primitive conception in the fact that the bail of our modern criminal law are bound 'body for body.' As Holmes says, modern books still find it necessary to explain that this

undertaking does not now render them liable to the punishment of the principal offender, if the accused is not produced." [1]

As we have said, the *wed* in many cases became a form, very often consisting of a rod or stick which was handed over as a symbol of the transaction. Another form, the hand grasp, seems to have been originally Roman[2] and may have been brought in from the continent by the Church; in the marriage ceremony, for example, both forms are employed, the hand grasp and the gift of a ring, while the ceremony of homage is done by a peculiar form of hand grasp. Under the influence of the Church another form appears, the pledge of faith. It is perhaps hardly accurate to regard this as a form, for the object involved was intensely real to the mediæval mind. The *wed* in this case was the promisor's hope of salvation, and it was characteristic of mediæval thought that this spiritual hope could be treated as a material object, and handed over as security for a debt or for the performance of a promise. Owing to its sacred character the faith was usually pledged to an ecclesiastic,—in important cases to a bishop,—but examples are to be found where this holy thing was committed to the strong hands of the sheriff. Later still, less solemn objects could be pledged, such as the promisor's "honor" or his "word." The Church always maintained that when faith was pledged she had jurisdiction over all the circumstances of the case, including the contract itself as well as the pledge. If this claim had been established England would very soon have received the canon law of contract, but Henry II, and later Edward I, firmly held out against it; by the Constitutions of Clarendon the Church's jurisdiction over the contract was denied, although the Crown did not object to the Church punishing breach of faith by spiritual censures as a sin. We have said nothing of written contracts in Anglo-Saxon law and indeed it seems that they were not in general use. When they do appear after the Conquest the contract under seal is treated as a form of the most solemn and binding kind. It has even been suggested that there may be a connection between the delivery by the promisor of a sealed document to the promisee, and the older method of delivering a *wed*. This may be, but still there can be no doubt that the written contract (which after the

[1] 2 Holdsworth, 83, 84.

[2] To other writers it seems Germanic; it is easy to exaggerate the antithesis between Roman and Germanic elements in early law.

Conquest was called an obligation) was mainly of continental origin.

When we come to Glanvill, we find that the common law of contract is slight and that the King's Court is not anxious to enlarge it. A new procedure appears, however, which will long remain important. This consisted in bringing an action of debt in the King's Court which the defendant declined to contest. Judgment was therefore entered for the plaintiff, who thus acquired the advantage of the royal machinery in enforcing judgment. There can be no doubt that many of these actions were collusive, one might almost say fictitious, and brought for the sole purpose of giving the creditor the benefit of a debt of record.[1] This becomes common soon after Glanvill's day. In his treatise Glanvill tells us that the writ of debt is rather a costly luxury; it is certainly framed upon an expensive model, for it is a *præcipe* like the writ of right and demands a sum of money of which the defendant deforces the creditor, and for a time the action of debt, like other real actions, led to trial by battle. Indeed, it was often denied that debt was contractual, being rather a real action based upon a grant.[2]

When we come to Bracton we find that he mentions an action which was unknown to Glanvill, namely, the action of covenant. By Bracton's day it was quite certain that the King's Court had decided not to regard those contracts which were concluded merely by forms, such as the delivery of sticks and other trifling objects, the only form which the King's Courts recognized henceforward being the contract under seal and the contract of record. Bracton has a good deal of Romanesque generalizations on the matter of contract, but it is clear, at least in this case, that his statements of substantive law accurately represent the practice of the King's Courts, which insisted that to be actionable a contract should be real, that is to say, money or chattels must have passed, or formal, and here Bracton identifies the contract under seal with the *stipulatio*. A curious survival from Anglo-Saxon times, however,

1 Compare the use of the fine as a conveyance; a later practice was to confess the debt and have it enrolled on the back of the Close Roll in Chancery. This was called a recognizance. The Statutes of Merchants and Staples set up special machinery for the recording of debts of this sort, and even allowed land to be taken in execution upon them.

2 See below, p. 408.

was the rule that the contract of suretyship, though made verbally, was yet enforceable; on the other hand, contracts effected by pledge of faith could not be enforced in the King's Court, nor would the Crown allow them to be enforced in the Church courts —at least in theory. "Although these courts, in spite of royal prohibitions, long continue to exercise much jurisdiction of this kind, it is clear that according to the common law as laid down in the royal courts the real and the formal principles were fast coming to be the only two recognized. . . . Bracton practically admits that there is no such thing as a consensual contract in English law."[1]

[1] 3 Holdsworth, 416.

CHAPTER II

THE FOURTEENTH CENTURY

In this chapter we shall describe the forms of action which might be used in contractual matters subsequent to the days of Bracton and before the general use of the action of assumpsit, which only becomes common at the beginning of the fifteenth century.

The oldest and most important was the action of debt which lay for formal contracts under seal if they specified a sum certain, and for a number of real contracts, that is to say, contracts where a *res* had passed between the parties. Debt could thus be used to recover the price of goods sold,[1] to recover money lent, and to recover the rent on a lease even although the lease was not written. It could also be used for certain special purposes such as the recovery of statutory penalties and for the enforcement of obligations arising out of suretyship. On the other hand there were grave defects attaching to the action of debt. The most notable of these was the form of trial by wage of law;[2] at the close of the fifteenth century petitioners will go to Chancery alleging that their debtor either intends to or actually has waged his law in defense of the debt, and Chancery openly treated this as amounting to the absence of remedy at common law. Then, too, as the middle ages proceeded the method of pleading in the action of debt became remarkably complicated, and, as we shall see, the law of contract has been influenced considerably by various procedural devices which were designed to avoid having to bring an action of debt. It will be noticed that in all the real contracts which are actionable by debt the defendant has received something—money, goods, a lease—from the plaintiff; in the language of the fifteenth century, there has been a *quid pro quo*, which is a

[1] It was not necessary that the goods be delivered, for a sale was regarded as an exchange of grants (not of promises); the grants of the goods and of the price constituted the *res* which passed. Ames, *Lectures on Legal History*, 91.

[2] Except in actions on specialty, for the courts soon refused to allow wager of law against a seal.

generalization from those real contracts which are actionable by a writ of debt.

The action of covenant which begins to appear about 1190 is slow in reaching its final form. Its principal use was to protect a lessee against his lessor, but in early times a variety of covenants and conditions made in connection with the transfer of land could be enforced by it. In local jurisdictions covenant showed signs of becoming a general contractual action, and we have already remarked upon the wide scope assigned to it in the Statute of Wales (1284). It seems, however, that we must distinguish between covenant in the King's Court and covenant in the county court. By the close of Edward I's reign it becomes a rule that covenant cannot be used in cases where debt would lie, and also that it is best to support an action of covenant by a writing of some sort, and very soon this becomes a requirement for an enforceable covenant to be under seal. Thus a covenant under seal changes its character; originally merely "a promise well-proved," as Holmes neatly expressed it, we now find that it has become a promise "of a distinct nature for which a distinct form of action was provided." In the middle of the sixteenth century it begins to be said that a "seal imports a consideration." This was merely a loose way of saying that just as a simple contract was enforceable because there was consideration, so a contract under seal was enforceable because there was a seal—because it was made in a binding form. The expression must not be allowed to obscure the fact that sealed contracts did not need a consideration, and were enforceable solely on the ground that they were formal. Nor was there any presumption of consideration, for sealed contracts were enforceable centuries before the doctrine of consideration came into existence.

It was most frequent, however, to use debt rather than covenant in the royal courts in the fourteenth century, and this was done by means of a bond under seal in a sum of money with a "defeasance" endorsed upon it saying that the bond shall be null and void upon the performance of certain acts. This was a practical method, for the courts by now refused to allow wager of law against a deed, and so we have many manuscript collections containing a great variety of "defeasances." For those who were prepared to risk a judgment on the bond if they failed to fulfil the

contract (there was no relief against penalties in either law or equity in this century), and whose affairs were considerable enough to warrant so formal a deed, the bond and defeasance provided many possibilities.

In some of its aspects the action of account has a bearing upon our subject, but during the fourteenth century its scope was very limited. In its origin it lay between lord and bailiff and was based upon a personal relationship. In view of this the procedure upon the writ of account was made exceptionally stringent— for example, a lord could appoint auditors, and if they found the account unsatisfactory they could commit the bailiff to the King's prison without any trial whatever.[1] Soon we find that account could also be used between partners, but here again the basis of the action is a particular relationship. If one were not the lord of a bailiff (or receiver), now a partner, the action of account was little good. Its fate was finally settled when it was held that one could not contract to become liable to an action of account; the action only applied to certain relationships. At the end of the fifteenth century a few extensions of its scope were made, but they were not serious enough to affect the general development of the law of contract.

We therefore see that in the fourteenth century the only contracts which are actionable are those which Bracton enumerates— and in the fourteenth century that means those enforceable by an action of debt, either because they are formal and supported by a deed under seal, or real, in which case the fact that the defendant has received a substantial thing (or grant) will establish his liability. As for mercantile affairs there was special custom to govern them. Edward I by his charter to the merchants expressly saved to them their old custom of making binding contracts by more simple forms, such as earnest money, instead of by deed under seal, and such mercantile contracts were actionable in the local commercial courts. It may be said with some fairness that the existence on the one hand of mercantile jurisdictions, and on the other of the spiritual courts which could bring moral pressure to bear, was a sufficient justification for the common law courts declining to expand their law of contract. Debt and covenant covered the cases which usually arose in a jurisdiction which con-

1 Statute of Marlborough (1267), c. 23.

sisted so far of landlords; where extension was needed for the protection of this particular class a Parliament of landlords was ready to give it—the statutory process on the action of account is an extreme example. For the rest, the common law could abstain with a clear conscience knowing that the matter was already in the expert hands of the Church and the merchants. It is only in the fifteenth century that the common law is compelled to face the problem of the simple contract, and this will form the subject of the next chapter.

CHAPTER III

ASSUMPSIT TO SLADE'S CASE

The King's Court was not very fond of contract, but it showed some interest in tort, and it is in the action of trespass that the quickest progress was made. In a number of cases it is possible to regard a particular situation from either point of view, and it was the treatment of such cases which served to introduce the idea of contract into actions of trespass.

"It is from the later years of Edward III's reign onwards that cases of this kind begin to be numerous; and it is in these cases, which were treated at first purely as cases of tort, that we can gradually trace the development of our modern theory of contract. The particular kind of action of trespass or deceit on the case which was brought in such cases gradually came to be known as the action of *assumpsit;* and assumpsit, without ceasing to be used as an action in tort, developed other branches, by means of which contracts expressed and implied, and at length even quasi-contracts, could be enforced. We shall see that it is to the conditions which must be fulfilled for the successful bringing of one or other of the forms of this action that we must look for the conditions which an agreement, other than an agreement under seal, must fulfil before it will be regarded by the law as a contract." [1]

In the middle of the fourteenth century cases begin to appear in which the action of assumpsit (in earlier times often called action on the case for assumpsit) could be used against a defendant who had undertaken to do a thing and had done it badly; thus assumpsit in its earliest period lies for malfeasance. The most famous case is the first (1348), in which the plaintiff alleged that the defendant had undertaken to carry his cattle across a river and so overloaded his boat that the cattle were drowned. The next case was in 1370 and was brought against a horse-doctor who undertook to cure a horse and treated it so negligently that it died. It will be observed from these cases that the court approaches them from the point of view of tort, in spite of the fact that the insistence upon an express assumpsit makes it look at first sight contractual. The defendant is really being charged on a tort rather

[1] 3 Holdsworth, 429.

than a breach of contract. Why then should it need an allegation and a proof of assumpsit to support an action in tort? Ames has suggested with great plausibility that the insistence upon an express assumpsit is derived from the mediaeval notion of liability. If I voluntarily hand over my horse to the care of a horse-doctor, he treats the animal at my invitation and therefore at my risk. If, however, he undertakes to cure it, and I on the faith of that undertaking allow him to treat the horse, then the risk falls upon him and I have suffered a deceit if my horse is the worse for his treatment. The idea of deceit is quite strong in several of these early cases of assumpsit, and when this is understood it will be seen that the assumpsit is not treated as basing the action upon contract, but as one of the elements of a deceit or fraud; the defendant undertook to do something and did it so badly that the plaintiff relying upon the deceitful undertaking suffered damages.

In the course of the fifteenth century assumpsit becomes common but the theory of it remains the same, as may be seen from the remarks of Newton (who shortly afterwards became a judge) in 1436.

"If a carpenter makes a covenant with me to make me a house good and strong and of a certain form, and he makes me a house which is weak and bad and of another form, I shall have an action of trespass in my case. So if a smith makes a covenant with me to shoe my horse well and properly, and he shoes him and lames him, I shall have a good action. So if a doctor takes upon himself to cure me of my diseases, and he gives me medicines, but does not cure me, I shall have an action on my case. So if a man makes a covenant with me to plow my land in seasonable time, and he plows in a time which is not seasonable, I shall have action on my case. And the cause is in all these cases that there is an undertaking and a matter in fact beyond the matter which sounds merely in covenant. . . . In these cases the plaintiffs have suffered a wrong." [1]

At this moment, too, we find assumpsit brought on certain cases of non-feasance—and for a time unsuccessfully. As the fifteenth century proceeds, however, it becomes more clear that a remedy for non-feasance is desirable. All through this period it must be remembered that the Council and the Chancery are rapidly developing and that the Chancery is beginning to administer a very elastic law of contract; the common law courts therefore must

[1] Quoted in 3 Holdsworth, 430.

have felt the competition and were consequently induced to extend the scope of assumpsit to cases of non-feasance as well. In the earlier fifteenth century there was a good deal of discussion on this problem. It was urged with a good deal of force that if a carpenter undertook to build a house and built it badly assumpsit undoubtedly lay; but has not the plaintiff suffered just as great damage if the carpenter fails to build at all? By the middle of the fifteenth century this seems to be accepted in principle. But as one of the serjeants said, if that principle is left unqualified it would mean "that one shall have trespass for any breach of covenant in the world." It is comparatively easy to give damages to a plaintiff whose loss has been occasioned by the negligent performance of some act which the defendant has expressly undertaken to do. But when it came to giving damages in cases where the defendant had not acted at all there were difficulties. Under such a rule any and every promise might become actionable. Every legal system has found it necessary to draw a line somewhere between promises which are enforceable in law and those which are not. Consequently common law courts towards the middle of the fifteenth century began to feel their way towards a test which would distinguish between those cases in which non-feasance gave rise to an action for damages, and those where it would not.

"The test ultimately reached was obtained by asking whether the damages resulting from the breach of the agreement was caused solely by the breach of the agreement, or whether, in consequence and on the faith of the agreement, the plaintiff had been led to change his position, so that the damage which he suffered was caused not merely by the breach of the agreement, but also by the change of position which the making of the agreement had induced. In the first case mere non-feasance in breach of an agreement was not actionable. In the second case it was. But this general test of the actionability of agreements was only gradually reached." [1]

The earliest cases in this development begin in 1442 and concern contracts for the sale of land. For a long time it had been old, established law that a contract for the sale of chattels gave the purchaser an action of detinue for the chattels and the vendor an action of debt for the price. But this did not apply to the sale

[1] 3 Holdsworth, 435.

of land (and it will be remembered that Chancery itself was faced with this problem, which it solved by establishing the rule that when the purchaser has paid the price the vendor holds to the use of the purchaser). The common law courts approached the matter from the point of view of deceit, and held that an action of deceit on the case would give remedy to a plaintiff who had paid money to the defendant for the purchase of land which the defendant refused to convey. In the earliest cases it is alleged that the vendor deceitfully sold the land to a stranger, but by the end of the century the action is sustained where the vendor merely refused to convey. Indeed, some justices were prepared to go so far as to sustain the action (at least in theory) even when the contract was wholly executory, and not to insist that the plaintiff's action depended upon having parted with his money.

This brings us to the end of the fifteenth century and very shortly we find in the reign of Henry VIII this important extension. Non-feasance becomes actionable not merely when the plaintiff has parted with money but also when he has parted with goods or labor. Thus when the plaintiff at the defendant's request supplies goods or services to a third person acting upon the defendant's promise to pay if the third person does not, then that promise is actionable. In all these cases, therefore, based as they are upon the idea of deceit, we find that the gist of the action is either that the plaintiff has parted with money in reliance upon the defendant's promise or else has suffered some "charge"—which was the term usually employed when he had given goods or labor. It will be seen that these conditions will easily fit into the formula of *quid pro quo* which had been developed in the action of debt. It is of course true that *quid pro quo* in the action of debt was regarded from the point of view of a benefit received by the promisor, while in assumpsit the *quid pro quo* is rather a "charge," that is to say, a detriment, to the promisee. This distinction was too slight to overcome the convenience of having one formula which would fit both actions.

So far all contracts which were wholly executory were unenforceable. The action of debt was based on a very different principle, for in the mediaeval view debt was a real action. It was not based upon contract but upon a grant—an ancient idea which is not easy to grasp at the present day when the intense realism of

mediaeval thought and philosophy is no longer familiar.[1] Consequently the theoretical basis of debt was far removed from that of assumpsit, for assumpsit contained the element of an undertaking by the defendant which he deceitfully failed to fulfil, whereby the plaintiff had lost money, goods or services. In debt there was no question of an undertaking, for the relationship arose not upon promises but upon grants, the parties exchanging one grant against another. From this point of view those contracts not under seal which would be enforceable by an action of debt did not contain those elements of express undertaking, and deceitful default to the damage of the plaintiff, which would give rise to an action of assumpsit.

But suppose that a promisor, being already in a situation which renders him liable to an action of debt, subsequently expressly undertakes to pay the debt. In this situation it was possible to say that besides being liable in debt, the promisor by his undertaking had now rendered himself liable to an action of assumpsit if he did not fulfil that undertaking. Consequently we find a new variety of assumpsit appearing in the middle of the sixteenth century called *indebitatus assumpsit* in which the plaintiff declares that the defendant being already indebted (*indebitatus*) undertook (*assumpsit*) to pay a particular sum. In all the early cases the distinction between debt and *indebitatus assumpsit* is strictly maintained. The subsequent assumpsit must be alleged, and, if traversed, must be proved. Thus we find the statement (apparently a comment or generalization by Sir Robert Brooke) that "where a man is indebted to me and promises to pay before Michaelmas, I can have an action of debt on the contract or an action of case (assumpsit) on the promise; for the promise debt does not lie."

In the closing years of the sixteenth century it would seem that the principle of the action of debt had ceased to look so natural; the doctrine of "reciprocal grants" is constantly repeated, especially by conservative judges, but we can hardly doubt that the distinction between the basis of debt and assumpsit began to look artificial to minds which were not specially trained in mediaeval thought. Still more so, the essential allegation of a sub

1 See the discussion of this in Langdell, *Summary of Contracts*, paragraphs 99–101; Pound and Plucknett, *Readings*, 589–593.

sequent undertaking to pay a pre-existing debt must have seemed artificial. There is, therefore, a strong movement to extend the action of *indebitatus assumpsit* by no longer insisting upon the necessity of the assumpsit, and by basing the action solely upon the indebtedness. If this were done, the action of *indebitatus assumpsit* would be practically coterminous with that of debt. There were other reasons as well. The action of debt could only be brought in the Common Pleas where the expensive services of a serjeant would have to be secured. In simple contracts there was usually a possibility of wager of law and in any case the pleadings had to be drawn with great care and particularity. It therefore occurred to the Court of King's Bench that it could introduce a useful reform and capture considerable business from the Common Pleas by allowing *indebitatus assumpsit* to be brought, and treating the assumpsit as implied and not traversable. This was already the situation in 1573, but for some time—nearly thirty years—the Court of Exchequer Chamber would reverse such decisions if brought before it in error. In 1601 the last of these reversals took place, and in 1602 in *Slade's Case* the whole question was thoroughly examined by all the judges and the matter was finally settled by the adoption of the King's Bench rule that "every contract executory implies an assumpsit."

It will be seen that this development of *indebitatus assumpsit* has changed the emphasis in the action of assumpsit. In the older cases the assumpsit merely served to prevent the defendant from saying that he acted solely at the plaintiff's invitation and therefore at the plaintiff's risk, where the case involved malfeasance; later when cases of non-feasance became actionable, the assumpsit served to show that the defendant had committed a wrong in undertaking to do a thing and failing to perform it; but when we come to *indebitatus assumpsit* the promissory character of the assumpsit is undeniable. Henceforward the idea of promise will be the principal element, and the old necessity for expressing the situation in terms of tort will have disappeared. At the same time the old basis of the action of debt has been replaced by a more modern one in assumpsit, which from this time forward will supersede debt in almost every case. The mediæval doctrine of mutual grants is replaced by words which are essentially modern:

"Every contract executory imports in itself an assumpsit, for when

one agrees to pay money or to deliver anything, thereby he assumes or promises to pay or deliver it; and therefore when one sells any goods to another and agrees to deliver them at a day to come, and the other in consideration thereof agrees to pay so much money at such a day, both parties may have an action of debt or an action of the case on assumpsit, for the mutual executory agreement of both parties imports in itself actions upon the case as well as actions of debt." [1]

At the close of the sixteenth century a further development takes place. Not only will an assumpsit be implied from situations where debt would lie, but a number of other cases will be remedied by an implied assumpsit. Thus in 1587 a traveler lodged at an inn without making an express agreement as to the price he was to pay, and it was held upon mediaeval authority that the action of debt would lie, for debt can only be brought for a liquidated sum; nor would *indebitatus assumpsit* lie, for there had been no expressed promise to pay. The doctrine in *Slade's Case* prevented such failure of justice for the future, and it soon became established that *indebitatus assumpsit* will be available to recover a fair price for goods and services although the price was not fixed by the parties at the time. Once again it has been suggested that the decision in *Slade's Case* was provoked by the competition of Chancery which already gave a remedy in such cases.

A still further development in the seventeenth century was the extension of *indebitatus assumpsit* to situations of constructive obligations, and the development of the law of quasi-contract. But these rapid developments seemed rash to some of the more timid minds, and we find, for example, as late as 1670, a last lament for mediaeval law by Chief Justice Vaughan, who declared that "the doctrine in *Slade's Case* is a false gloss to turn debt into assumpsit, for contracts of debt are reciprocal grants."

[1] *Slade's Case* (1602), 4 Rep. 92 b.

CHAPTER IV

CONSIDERATION

Down to the fourteenth century when the common law had several contractual actions such as debt, covenant, account and assumpsit, (to which must be added in the fifteenth century the peculiar treatment of contract in equity), there was a possibility that each one of these actions would develop a body of contract law peculiar to itself. If this had happened we should have had four or five different types of contract, every one of which would be governed by its own peculiar law. Events so happened that this did not occur; as we read in *Doctor and Student:*

"It is not much argued in the laws of England what diversity is between a contract, a concord, a promise, a gift, a loan or a pledge, a bargain, a covenant or such other. For the intent of the law is to have the effect of the matter argued and not the terms."

This happy result was due to several causes. In the first place the different courts were, in fact, on intimate terms. It did not matter so much that they were usually terms of rivalry, for even then they kept close watch upon developments in other institutions, and competed in providing the best remedy. Then, again, since the development took the form of modifying the different forms of action, it was inevitable that there should be a good deal of overlapping, and consequently the boundaries between them became obscure. In such a case it was all the more easy to emphasize substance above form. Finally, one of those forms of action supplanted all the rest for practical purposes, and from the seventeenth century onwards the law relating to assumpsit is the law of contract, and, historically speaking, that consideration which makes a contract enforceable was principally the conditions which were necessary to maintain an action of assumpsit.

The details of the history of consideration are much too complicated for discussion here, and only a few general remarks will be given upon its development.[1] Owing to the successive changes

[1] For an indication of the problems involved, see the extracts in Pound and Plucknett, *Readings*, 602–613.

in the character of assumpsit there were a number of different conditions which were necessary according to circumstances to sustain the action. From its original character came the element of detriment to the promisee; after *Slade's Case* assumpsit incorporates the law of debt and so takes over the doctrine of *quid pro quo;* then, too, there was considerable influence from Chancery. Late in the fifteenth century Chancery had been developing a law of contract on completely independent lines. It seems as though the ecclesiastical Chancellors made a determined attempt to apply the canon law doctrine of *cause*. By means of a long and curious history the *causa* of Roman law assumed a completely different aspect in the thought of the canonists.[1] In their view *cause* might consist in any definite object which the promisor at the time proposed to attain; if his promise was deliberately made with some definite aim in view there was sufficient *cause* to sustain an action. The end in view need not necessarily be of a business character; peace, charity, and moral obligation were all sufficient *cause* to make a promise actionable.

There may have been a certain amount of influence by Chancery upon the common law courts during those last years of the fifteenth century and the beginning of the sixteenth when the Chancellors and the common law judges are so frequently found conferring together. But it was not until the eighteenth century that these foreign influences began to have a very serious effect upon the common law. In this respect Lord Mansfield and other judges who were under his influence played an important part, endeavoring to incorporate in the doctrine of consideration ideas from outside the common law which were only known in England (and partially at that) through the Chancery. The new point of view treated moral obligation as if it were the primary factor which made the promise actionable, while the mass of common law rules concerning consideration were to be treated as merely affording evidence. The process begins with *indebitatus assumpsit* brought on a preceding debt where that debt for one reason or another, although actually incurred, was not enforceable. For example, in 1697 a defendant who promised to pay debts incurred

[1] Briefly summarized by Le Bras in *Legacy of the Middle Ages*, 354, and in 8 Holdsworth, 42. This doctrine of *causa* has survived in modern French law as *cause*.

during his minority was held bound in assumpsit; so, too, one who promised to pay debts barred by the Statute of Limitation. Lord Mansfield carried this idea still further when he applied it to a promise by a discharged bankrupt, declaring that in conscience a discharge from bankruptcy does not relieve the debtor of his debts, and that a promise to fulfil this moral obligation is actionable. He expressed the view that consideration is, and historically always had been, in the nature of rules of evidence, and although this extreme doctrine was immediately overruled by the House of Lords in 1778 it was still possible to hold, and indeed such was the prevailing opinion, that the requirements of consideration were fulfilled if there existed a moral obligation. This point of view prevailed through the eighteenth century and was not abandoned until just a hundred years ago. Among the influences which made for this last change of policy was the Statute of Frauds, which defeated Lord Mansfield's attempt to make any informal writing enforceable, even although it did not comply with the statute; and then, too, the real history of consideration began to be studied, with the result that it was discovered that there was no historical basis for Lord Mansfield's view. Finally, the Hilary Rules of 1834 abolished the general issue in assumpsit and therefore compelled plaintiffs to plead specially all those matters which they considered necessary to their action. Consideration, therefore, as a result of these Rules became what it had been originally, namely, a matter of procedure. Consequently the development of consideration has been brought back to common law principles, save in those cases where the influence of equity in Chancery (or the imitation of equitable doctrines of the common law courts) has introduced rules which still remain and which refuse to fit in with any general theory of consideration.[1]

The result has been a body of doctrine which, "roughly stated, seems plain and sensible: the court will hold people to their bargains but will not enforce gratuitous promises unless they are made in solemn form." But it is inevitable that situations should arise fairly frequently in which the doctrine of consideration produces unsatisfactory results, and there is a good deal of criticism in consequence. Holdsworth suggests that "there is good

[1] See Pound, *Consideration in Chancery*, *Wigmore Celebration Essays*, 435–460.

sense in Lord Mansfield's view that consideration should be treated not as the sole test as to the validity of a simple contract, but simply as a piece of evidence which proves its conclusion."[1] The very changes which the doctrine of consideration has undergone are a warning that there is nothing in it more peculiarly fundamental that in many other legal doctrines, and that a theory which has changed so much in the past may very well change once again in the future.

"A legal history is not perhaps the place to make suggestions as to the law of the future. It is concerned with the past. But if history is to be something more than mere antiquarianism, it should be able to originate suggestions as to the best way in which reforms in the law might be carried out so as to make it conform with present needs."[2]

With this observation we may very well conclude. Most of the great English historians have consistently urged that their study of history has strengthened their faith in reform. Nowhere has this been expressed more clearly than in Maitland's address on the making of the German civil code. That code contains some matter that was new and some that was extremely old; "but all this stuff wheresoever obtained has recently been passed through modern minds, has been debated, criticized, refined, and an endeavor has been made to present it as a single, coherent, homogeneous whole." Later on, in the course of the same address, he severely criticizes the law of real property—he was speaking in 1906—in words which embody a great deal of historical wisdom.

"It seems to me to be full of rules which no one would enact nowadays unless he were in a lunatic asylum. And surely that should be the test. Would you enact that rule nowadays? Can you conceive that any sane man would enact that rule nowadays?

"To say that a rule is historically interesting is not to the point. For myself, I happen to think that legal history is a fascinating matter for study. It is pleasant, and I even believe that it is profitable, to trace the origins of legal rules in the social and economic condition of a bygone age. But anyone who really possesses what has been called the historic sense must, so it seems to me, dislike to see a rule or an idea unfitly surviving in a changed environment. An anachronism should offend not only his reason, but his taste. Roman law was all very well at Rome; mediæval law in the middle ages. But the modern man in a

1 8 Holdsworth, 47; Lorenzen, *Causa and Consideration in Contracts*, 28 Yale Law Journal, 621–646.

2 8 Holdsworth, 48.

toga, or a coat of mail, or a chasuble, is not only uncomfortable but unlovely. The Germans have been deeply interested in legal history; they were the pioneers; they were the masters. That has not prevented them from bringing their own law up to date. Rather I should say that it encouraged them to believe that every age should be the mistress of its own law."[1]

[1] 3 Maitland, Collected Papers, 486, 487.

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DATE DUE

OCT 01 1979

DEC 01 1979

FEB 1 1980

OCT 01 1982

OCT 06 1986

GAYLORD

PRINTED IN U.S.A.